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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1977

No. 77-983

STATE OF WASHINGTON, WASHINGTON STATE DEPARTMENT OF FISHERIES, and ITS DIRECTOR,
Petitioners,

vs.

WASHINGTON STATE COMMERCIAL PASSENGER FISHING VESSEL ASSOCIATION and WASHINGTON KELPERS ASSOCIATION,
Respondents.

STATE OF WASHINGTON, WASHINGTON STATE DEPARTMENT OF FISHERIES, and ITS DIRECTOR,
Petitioners,

vs.

PUGET SOUND GILLNETTERS ASSOCIATION, PHILIP SUTHERLAND, PURSE SEINE VESSEL OWNERS ASSOCIATION and FRANK MARINKOVICH,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE WASHINGTON STATE SUPREME COURT

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STATE PRINTING PLANT OLYMPIA, WASHINGTON

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PETITION FOR WRIT OF CERTIORARI TO THE WASHINGTON STATE SUPREME COURT

Petitioners Washington State, Washington State Department of Fisheries and the Director of that Department, hereinafter jointly "Fisheries" or "petitioners", pray that a writ of certiorari issue to review:

(1) The opinion and judgment of the Supreme Court of Washington entered in *Puget Sound Gillnetters Assn. v. Moos*, on denial of a motion for rehearing on October 10, 1977.

(2) The opinion and judgment of the Supreme Court of Washington in *Washington Commercial Passenger Fishing Vessel Assn. v. Tollefson* entered on 23 November, 1977, after reconsideration.

OPINIONS BELOW

The opinion of the Supreme Court of Washington in *Puget Sound Gillnetters Assn. v. Moos*, hereinafter *"Gillnetters"*, (Appendix D) is reported in 88 Wn.2d 677, ____ P.2d ____ (1977).

The original opinion of the Supreme Court of Washington in *Washington State Commercial Passenger Fishing Vessel Assn. v. Tollefson*, hereinafter *"Fishing Vessel I"*, (Appendix F) is reported in 87 Wn.2d 417, 553 P.2d 113 (1977). A motion for reconsideration was granted (Appendix E). The decision upon reconsideration is found at 89 Wn.2d 276, ____ P.2d ____ (1977) hereinafter *"Fishing Vessel II"*, (Appendix B). The judgment, findings of fact and conclusions of law of the Superior Court for Thurston County in the latter action are unreported and appear in the Appendix at G.

JURISDICTION

The judgment of the Supreme Court of Washington in *Puget Sound Gillnetters Assn. v. Moos* became final upon denial of a motion for rehearing by a vote of five to three on October 10, 1977. The judgment of the Supreme Court of Washington in *Washington State Commercial Passenger Fishing Vessel Assn. v. Tollefson* became final when its decision was rendered after rehearing on 23 November 1977. The jurisdiction of this court is invoked under 28 USC 1257(3). This single petition is filed pursuant to Rule 23.5 of this Court in that the cases involve identical or closely related questions.

QUESTIONS PRESENTED

1. Do treaties executed by the United States with certain Indian tribes in 1854-55 in the Territory of Washington require state fishery management agencies, in the absence of authorization under state law, to restrict fishing by non-Indians in order to provide a specified number or percentage of fish to Indian descendents of the signatories to the treaties?

2. Is the determination by the Washington State Supreme Court that such allocation of fish is beyond the authority of state agencies a matter of state or federal law?

3. Can federal district court in interpreting the treaty language "right to fish at usual and accustomed grounds and stations in common with all citizens" require that Indian fishermen be entitled to all fish they desire for subsistence and ceremonial use, all fish harvested on reservation plus 50% of the additional harvest and empower

or require state agencies, officers and employees to effectuate such a division of the resource?

4. Does a special allocation of fish to treaty Indians who are citizens of the United States and a reduction in the available fishery for other United States citizens constitute a violation of the constitutional doctrine of equal protection and prohibition of granting of special privileges and immunities.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES INVOLVED

Constitutional provisions, treaties and statutes involved are as follows and are reproduced in Appendix A, *infra*, pp. A-1 to A-9.

CONSTITUTIONAL PROVISIONS

	Appendix Page
(1) CONSTITUTIONAL PROVISIONS OF THE UNITED STATES	
(a) Article II, Section 2, *Powers of the President* (Section 2 Clause 2) (Presidential powers with the Advice and Consent of the Senate to make Treaties).	A-1
(b) Article VI, *Debts, Supremacy Oath*, #2, Supremacy.	A-2
(c) Amendment V, *Due Process.*	A-2-3
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(2) CONSTITUTIONAL PROVISIONS OF WASHINGTON STATE	
(a) Article 1, *Declaration of Rights* (Section 8, Irrevocable Privilege, Franchise or Immunity Prohibited).	A-4
(b) Article I, *Declaration of Rights* (Section 12, Special Privileges and Immunities Prohibited)	A-4

TREATIES

Six treaties were entered into by the United States with various Indian tribes and bands living in the State of Washington in 1854 and 1855. The six treaties are:

	Appendix Page
(a) Treaty of Medicine Creek, 10 Stat. 1132.	A-4
(b) Treaty of Point Elliott, 12 Stat. 927.	A-5
(c) Treaty of Point No Point, 12 Stat. 933.	A-5
(d) Treaty with the Makahs (Treaty of Neah Bay), 12 Stat. 939.	A-5-6
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(f) Treaty with the Yakimas, 12 Stat. 951.	A-6-7

Those six treaties each contain a similar provision, only that provision is repeated in the appendix. The following is typical:

> The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing together with the privilege of hunting, gathering roots and berries, * * * on open and unclaimed lands. Provided however, that they shall not take shellfish from any beds staked or cultivated by citizens.

STATE OF WASHINGTON STATUTES

(a) RCW 75.08.012, Duties of the [Fisheries] Department. A-7-8

(b) RCW 75.08.080 Rules and Regulations — Scope. [Fisheries] A-8-9

STATEMENT OF THE FACTS

(a) *Treaties.* In the mid-1850's, the United States entered into a series of treaties with Indians in areas of what are now the States of Washington, Oregon and Idaho. Each of these treaties provided for continued fishing by those Indians in essentially similar language: "the right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory." 10 Stat. 1132, Medicine Creek Treaty. (Appendix A, p. A-4).

At the time of the execution of these treaties, the Indians were not citizens of the United States.

(b) *The Fishery.* At the time of the execution of these treaties, commercial fishing enterprise was

either unknown or, in those areas in which such activity had commenced, rudimentary and largely unsuccessful. This is because the process for preparing the fish for shipment to distant markets was not perfected. The invention and perfection of the canning process did not come until late in the Nineteenth Century. With the advent of the canning process commenced the development of large-scale commercial fisheries which have been and now are open to all citizens, Indian and non-Indian. The resultant boom in commercial fishing brought the need for state regulation to conserve the species and provide for an orderly fishery.

This proceeding is concerned with the fishery for anadromous fish. These fish spawn in either the fresh water systems or hatcheries of the State of Washington. At a particular time of their life cycle, they migrate out into the Pacific Ocean where they feed for one or more years, then return to the areas from which they originate to spawn. After spawning, salmon die.

There are five species of salmon in the State of Washington: chinook, coho, chum, pink and sockeye salmon. The numbers caught each year vary. Total commercial catch is in the millions of fish and annual values (to the fishermen) in the tens of millions of dollars. (In 1976, over 43 million dollars.)

(c) *Regulation of the Fishery.* In recognition of an apparent decline in numbers of salmon in the State of Washington resulting in part from the increasing commercialization in the early part of the

Twentieth Century, legislation of that state created an administrative agency with authority to regulate and conserve the food fisheries resources. That agency is the Department of Fisheries, petitioner herein, headed by a Director with authority to promulgate such regulations. (Game fish, such as steelhead trout, are regulated by a different agency.)

(d) *The Court Conflict.* The United States District Court for the Western District of Washington rendered a decision on February 12, 1974, interpreting the treaties in question here. *United States v. Washington,* 384 F.Supp. 312 (W.D. Wa. 1974). The federal district court held that the treaty language quoted above p. 6 required the state (and petitioner Fisheries) to exercise its regulatory police powers to restrict non-Indian fishermen in order to provide treaty Indians 50 percent of all the harvestable fish which would return to their usual and accustomed areas if there were no other fisheries plus (1) commercial harvest on reservation, (2) harvest for personal consumption, and (3) harvest for ceremonial purposes. These last three categories of catch are not counted by the federal court. The court did not allow nontreaty commercial and sport fishing to participate as parties in the trial of that action. (Purse Seine Vessel Owners Association, a plaintiff in *Puget Sound Gillnetters Assn. v. Moos,* was specifically rejected when they applied to intervene in that action.)

Petitioners made good faith efforts to comply

with the district court's decision and subsequent orders. The regulations as demanded by the court were promulgated, i.e., restriction of the non-Indian harvest to provide the required numbers of fish to treaty Indians.

Non-Indian fishermen of the state challenged the regulations in the courts of the State of Washington. The lower court of the State of Washington and eventually the Washington State Supreme Court in actions sought to be reviewed here held that such regulations are unlawful and may not be promulgated by petitioner. This occurred in the trial courts on several occasions despite the issuance of injunctions by the federal district court which purported to enjoin the state court proceedings. (See, e.g., Appendix, pp. H-1-6.)

The first of such regulations were promulgated in 1974 shortly after the decision in *United States v. Washington.* They were challenged in that year in the case *Fishing Vessel Assn. v. Tollefson* (Appendix B). The Thurston County Superior Court overturned those regulations, finding that they were beyond the statutory authority of Fisheries (petitioners herein). At this early stage, the argument was advanced and rejected that the Supremacy Clause required that states, their agencies and courts in recognizing treaties as the supreme law of the land must comply with federal court interpretation and implementation of those treaties. That this was the purpose of the challenged regulation is made clear in the decision of the Washington State Supreme

Court in first considering the state's appeal in the Fishing Vessel Association (hereinafter Fishing Vessel I) case:

> The Thurston County Superior Court found as a fact that the regulations in question were adopted solely as a result of the decision by the federal district Judge George H. Boldt, Western District of Washington at Tacoma, in *United States v. Washington.*

Fishing Vessel Assn. I, supra, at 417, Appendix pp. F-1-2.

By the time the Washington State Supreme Court had an opportunity to consider the appeal, the season to which the regulations would have pertained was over. Though recognizing that:

> Questions presented here are indeed serious and involve a conflict between the state and federal courts in this jurisdiction.

Fishing Vessel Assn. I, p. 419, Appendix p. F-3.

The Supreme Court of Washington dismissed the case as moot.

Subsequently, a motion was filed by petitioners asking the Washington Supreme Court to rehear the case. It was granted.

Prior to the rehearing of that action, another effort was made to get these same questions resolved. An original action was filed in the Washington State Supreme Court in *Puget Sound Gillnetters Assn. v. Moos* asking a writ of mandamus/prohibition to order Fisheries not to promulgate the regulations required by the federal court. In that case, petitioners also sought to raise each and every issue including whether through the supremacy clause the federal

court interpretation of the treaties became binding upon petitioners and the courts of the State of Washington. Those and other constitutional issues were considered as can be seen from the opinion of that court, pp. 684-693, Appendix, pp. D-8-17.

In the latter action, petitioners requested the participation of the United States Government and the treaty tribes in order to assure all issues were raised. The United States Department of Justice and numerous tribes did participate *amicus* but declined to ask party status.

The decision in *Gillnetters* was rendered 9 June 1977. (Appendix, pp. D-1) The court declined at that time to issue a mandamus/prohibition writ.

After rehearing the *Fishing Vessel* case, the Washington State Supreme Court rendered its decision 23 November 1977. The United States and tribes were also asked to participate in that action but declined to do so.

On October 10, 1977, with the denial of a petition for rehearing, the *Gillnetters* case became final.

Subsequently, the fishing groups in *Gillnetters* have renewed their request for a mandamus order from the Washington State Supreme Court contending in part the petitioners here have been or will continue to comply with the federal district court's orders. A mandamus was issued on a preliminary basis by the Chief Justice of the Washington State Supreme Court. It is also presently under consideration by the whole court.

As may be more fully seen from the decisions (Appendix pp. D-8-7 and B-4-11), the Washington State Supreme Court has held that regulation to comply with the federal court orders and allocate over 50% of the fish to Indians are beyond the statutory authority of petitioner Fisheries and barred by the constitutional prohibition against the granting of special privileges and immunities and the constitutional requirement of equal protection. Thus, such regulations may not be enforced in the courts of the State of Washington.

REASONS FOR GRANTING THE WRIT

Presently in the State of Washington there is a direct confrontation between the state and federal court systems with directly conflicting decisions and orders from those courts.[1]

The Washington State Supreme Court, in holding unconstitutional implementation of the federal court's interpretation of the Indian treaties because violative of the equal protection requirements of the Fourteenth Amendment, and prohibitions against special privileges and immunities has decided a "federal question of substance not theretofore determined" by the United States Supreme Court. Supreme Court Rule 19(a) lists this as an appropriate consideration in deciding whether grant of a writ of certiorari is appropriate.

This court has not considered the specific

[1]Note, e.g., finding of the federal district court in a recent order: "Those rulings [by the State Supreme Court] prevent defendants from complying with earlier decrees of this court."

allocation of the federal court previously (50% plus reservation ceremonial and subsistence). The Washington Supreme Court finds that particular allocation constitutionally offensive:

> the granting of more than 50 percent of the harvestable fish to .028 percent of the population (treaty Indians) and less than 50 percent to 2,243,069 non-Indian population, violates the equal protection clause of the fourteenth amendment to the United States Constitution.

Fishing Vessel II, supra, 285-286, Appendix p. B-10-11.

This Court has, of course, previously considered the treaty provision in question, most recently in *Puyallup Tribe v. Department of Game*, ___ U.S. ___, 53 L.Ed.2d 667, 97 S.Ct. 2616 (1977). In that case an allocation of fish to treaty Indians was approved. The fish were steelhead trout, a game fish in Washington regulated by a different agency from petitioners herein. The problem, however, in that case was one of protecting the non-Indian share and indeed the fish themselves from treaty Indians asserting an exclusive right to them subject to no controls. The result this Court approved, however, is an allocation of fish to treaty Indians based on the treaties in question.

As well as barring the allocation decreed by the federal district court, the Washington Supreme Court decisions may bar any allocation at all to treaty Indians:

> Indians are citizens of the United States * * * they can neither be denied equal protection of the laws nor granted special

> privileges and immunities * * *
> * * * [Fisheries] cannot allocate fish to any user of the same class, every fisherman in a class must be treated equally and each should be given an equal opportunity to fish within lawful statutes and regulations.

Gillnetters, supra, 684, 692-693, Appendix pp. D-8, 16-17.

To the extent the Washington Supreme Court decisions bar any allocation, they may be considered "probably not in accord with applicable decisions of this Court", alternative grounds for granting a writ of certiorari under Rule 19-1(a) of this Court.

It is recognized that the Court will not review a case where the problems are hypothetical or speculative. Petitioners believe the problems here are rather real and immediate falling within the meaning of "special and important reasons" mentioned by Court rule 19 for granting a writ of certiorari:

> A federal question raised by a petition may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. (*Magnum Imports Co. v. Coty,* 262 U.S. 159, 163; see also Address of Mr. Chief Justice Vinson, before the American Bar Association, Sept. 7, 1949, 69 S.Ct. v, vi; Address of Mr. Chief Justice Hughes, before the American Law Institute, May 10, 1934, XI Proc. Adm. Law Inst. 313.) "Special and important reasons" imply a reach to a problem beyond the academic or the episodic.

Rice v. Sioux City Cemetery, 349 U.S. 70, 74, 75 S.Ct. 614, 99 L.Ed. 897 (1955).

That the problem in the State of Washington is

beyond the academic and episodic is clearly recognized by the Supreme Court of that state:

> [T]his has become more than an exercise in legal theory, it has developed into a serious social and economic conflict of major proportions. I do not exaggerate when I say that all too frequently lives and property rights have already hung in balance.

(Stafford, concurring in part, dissenting in part in *Gillnetters, supra,* at 698, Appendix p. D-22)

Severe and pressing problems of law enforcement in the management of significant and important salmon fisheries have been raised. Confusion in law enforcement has frustrated efforts to biologically manage the resource for orderly harvest while assuring protection of fish runs.

Beyond these real management problems, the Court should fully understand the situation of petitioners.

The State of Washington and its Department of Fisheries are in an unenviable position, caught between conflicting decisions of the federal court and state court systems.

Fisheries' Director has been ordered to show cause why he should not be held in contempt of court — in both federal and state courts. (He has not yet been judged in contempt, however.)

The State of Washington Department of Fisheries and its Director have been prevented by the state decisions from enforcing state laws and regulations as ordered by the federal court. State officials are seeking to enforce state laws but those laws have been held violative of the federal

constitution by state courts. This court has consistently granted review of these types of important cases:

> The question of our authority to grant certiorari, on the application of state officers, to review decisions of state courts declaring state statutes, which these officers seek to enforce, to be repugnant to the Federal Constitution, has been carefully considered and our jurisdiction in that class of cases has been sustained * * *

Coleman v. Miller, 307 U.S. 433, 442-444, 59 S.Ct. 972, 83 L.Ed 1385 (1938).

This Court there cited numerous examples of prior cases in which such review was held appropriate. They include: *Blodgett v. Silbermann*, 277 U.S. 1, 72 L.Ed. 749, 48 S.Ct. 410 (1928) (certiorari granted to Connecticut tax commissioner where state supreme court held imposition of certain taxes unlawful); *Boynton v. Hutchinson Gas Co.*, 291 U.S. 656, 78 L.Ed. 1048, 54 S.Ct. 457 (1934) (certiorari granted *after argument* to the Attorney General of Kansas where that state's supreme court ruled a state statute unconstitutional under the United States Constitution); *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587, 80 L.Ed. 1347, 56 S.Ct. 918, 103 A.L.R. 1445 (1936) (certiorari granted to New York prison warden where New York Court of Appeals held state minimum wage law violated the Federal Constitution), and *Kelly v. Washington ex rel. Foss Co.*, 302 U.S. 1, 82 L.Ed. 3, 58 S.Ct. 87 (1937) (writ of certiorari granted to Washington State official where the supreme court of that state

held a vessel inspection law to be an unconstitutional interference with interstate commerce).

Petitioners also believe that the conflict between the federal and state courts alone is a special and important reason for this Court to grant the requested writ.

Of the existence of the conflict, a crisis of constitutional magnitude, there can be no doubt. Often when such a conflict looms, it is avoided. The doctrines of comity or abstention may be invoked and direct conflict is avoided.

Here, however, the courts recognize but have been unable to avoid the conflict. It was clearly recognized in the recent decisions of the Washington State Supreme Court, review of which is sought here:

> We hold the Director of the Department of Fisheries of the State of Washington does not have authority to apportion fish to conform to the federal district court decision, the federal district court cannot compel the state officer to act beyond his statutory authority, and the granting of more than 50 percent of the harvestable fish to 0.8 percent of the population (treaty Indians) and less than 50 percent to 2,243,069 non-Indian population, violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution."

Fishing Vessel Assn. v. Tollefson, supra, at 285-286, Appendix pp. B-10-11.

The federal district court in a recent series of orders also recognized the conflict:

> Decisions by the Washington Supreme

> Court in *Puget Sound Gillnetters Assn. v. Moos*, 565 P.2d 1151 (1977), and *Purse Seine Vessel Owners Assn. v. Moos*, No. 43938, July 1977, have apparently given approval to the state court practice of dismissing prosecutions against non-treaty fishermen. In *Puget Sound Gillnetters Assn. v. Moos*, the Washington Supreme Court said that the Director of Fisheries may not "allocate fish among competing claimants for purposes other than conservation," and that he may not allocate fish to treaty Indians or to non-Indians. Those rulings prevent defendents from complying with earlier decrees of this court.

Order of 27 September, 1977, in *United States v. Washington*.

Petitioners respectfully request that this Court recognize this conflict as those courts have done and resolve that conflict. Thus, the court must compare the conflicting interpretations and implementation of the treaties and choose which is to be the law of the land.

The opinion of the federal court on how this conflict should be resolved is not of record (unless the several injunctions against state court proceedings reflect an opinion). The thoughts of the Washington Supreme Court on the subject have been expressed:

> This dilemma can be resolved only by the Supreme Court of the United States.

Fishing Vessel I, p. 421, Appendix p. F-5.

> Such an interpretation by the ultimate legal authority is the only way the current legal, economic and social conflict can be resolved. Most assuredly, this unresolved clash between federal and state judicial systems and between

> economic and social interests cannot be permitted to continue. Too much is at stake in all areas.

Gillnetters (Stafford concurring in part, dissenting in part), *supra*, at 698, Appendix p. D-22.

Short of such resolution, the situation in the State of Washington continues chaotic and violence has come to the waters of the State of Washington as a result.

As this controversy has continued and the conflict between the courts has developed, it is unfortunate there has not yet been a forum in which all interested parties have been able to litigate as parties. The intervention of all but one sport and commercial fishing groups was successfully opposed by the United States and tribes in *United States v. Washington*.

The state and its agencies have continued good faith efforts to give notice to the United States and the tribes of all actions which may affect their ability to implement the requirements of the *United States v. Washington* decision.

At the request of the United States and the tribes, the federal court has ordered the state to provide notice of such state proceedings and copies of the pleadings involved (see order of the federal court, reproduced in the appendix H-6).

Rather than participate in these numerous cases the United States and the tribes have on several occasions sought to enjoin the Washington courts. The district court has granted several orders enjoining the state superior courts from considering

any cases which may affect the implementation of the *United States v. Washington* decision (E.g., Appendix, p. H-5). Though those orders have been disregarded, no effort has yet been made to cite any state judge for contempt.

That order is of particular interest in that it leaves it to the state court to determine when actions are subsequently filed whether or not they may affect the ability of the state to implement the decision. Probably the penultimate crisis between the courts came when the United States Government brought a motion asking the federal district court to enjoin the Washington State Supreme Court in the *Gillnetters* case, review of which is sought here. Fortunately, that motion was denied.

As the cases sought to be reviewed here were taken to the Washington State Supreme Court, the state agencies invited the United States and the tribes to participate as parties. Indeed, in the *Gillnetters* case the state actually moved to interplead the United States. Despite this notice and the requests by the state to intervene, the United States and the tribes have consistently chosen to participate if at all only as *amicus* (their status in *Gillnetters*). We also urge their participation in this Court.

Orders of the federal court which conflict with the decisions we seek to have reviewed here are on appeal to the Ninth Circuit Court of Appeals. Numerous such appeals are presently set for argument in January and February of 1978. They

include orders of the federal district court allocating special fisheries for Washington Indians from the Canadian Fraser River run managed by the International Pacific Salmon Fisheries Commission (pursuant to treaty with Canada), orders allocating specific numbers of fish to treaty Indians in the most recent season, orders taking over the management of the state's fisheries (including providing for enforcement through contempt of court against individual fishermen), and an order extending this system beyond the original case area and beyond the area ceded by treaty.

It must be candidly admitted whoever prevails in those appeals, it is likely review of such decision will be sought before this Court. It may be possible to consolidate such a case with the instant action for full resolution of all issues.

The cases here, however, are an adequate and appropriate vehicle for the necessary resolution of the conflicts described above.

The confrontation between the state and federal courts with petitioners bound by conflicting decisions of each must be resolved by this Court, the only court capable of resolving such conflict.

CONCLUSION

For the above reasons, writs of certiorari should issue to review the judgments and opinions of the Supreme Court of the State of Washington.

Respectfully submitted:

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January 2, 1978

INDEX TO APPENDIX

(A) CONSTITUTIONAL PROVISIONS, TREATIES AND STATUTES

(B) OPINION — Wash. State Commercial Passenger Fishing Vessel Assn. v. Tollefson, 89 Wn.2d 276

(C) ORDER DENYING MOTION FOR RECONSIDERATION — Puget Sound Gillnetters Assn., et al. v. Donald Moos, No. 44401

(D) OPINION — Puget Sound Gillnetters Assn. v. Moos, 88 Wn.2d 677

(E) ORDER GRANTING PETITION FOR REHEARING — Washington State Commercial Passenger Fishing Vessel Assn. v. Tollefson and Washington Kelpers Assn. v. Tollefson No. 43642

(F) OPINION — Washington State Commercial Passenger Fishing Vessel Assn. v. Tollefson and Washington Kelpers Assn. v. Tollefson, 87 Wn.2d 417

(G) JUDGMENT and FINDINGS OF FACT AND CONCLUSIONS OF LAW — Washington State Commercial Passenger Fishing Vessel Assn. v. Tollefson and Washington Kelpers Assn. v. Tollefson, Nos. 50370 and 50552

(H) PRELIMINARY INJUNCTION STAYING STATE COURT INJUNCTION AND ORDER IMPLEMENTING PRELIMINARY INJUNCTION — United States v. Washington, No. 9213

APPENDIX A

UNITED STATES CONSTITUTION

ARTICLE II

§ 2 POWERS OF THE PRESIDENT. The president shall be commander in chief of the army and navy of the United States, and of the militia of the several states, when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment.

He shall have power, by and with the advice and consent of the senate, to make treaties, provided two-thirds of the senators present concur; and he shall nominate, and by and with the advice and consent of the senate, shall appoint ambassadors, other public ministers and consuls, judges of the supreme court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the congress may by law vest the appointment of such inferior officers, as they think proper in the president alone, in the courts of law, or in the heads of departments.

The president shall have power to fill up all vacancies that may happen during the recess of the senate, by granting commissions which shall expire at the end of their next session.

ARTICLE VI

Debts, supremacy, oath. All debts contracted and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the confederation.

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the iand; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding.

The senators and representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

AMENDMENT V

RIGHTS OF ACCUSED IN CRIMINAL PROCEEDINGS. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be

subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT X

POWERS RESERVED TO STATES OR PEOPLE. The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

AMENDMENT XIV

§ 1 CITIZENSHIP RIGHTS NOT TO BE ABRIDGED BY STATES. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

WASHINGTON STATE CONSTITUTION

ARTICLE I
DECLARATION OF RIGHTS

§ 8 IRREVOCABLE PRIVILEGE, FRANCHISE OR IMMUNITY PROHIBITED. No law granting irrevocably any privilege, franchise or immunity, shall be passed by the legislature.

§ 12 SPECIAL PRIVILEGES AND IMMUNITIES PROHIBITED. No law shall be passed granting to any citizen, class or citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.

TREATIES

TREATY OF MEDICINE CREEK

December 26, 1854
10 Stat. 1132

ARTICLE III. The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands: *Provided, however,* That they shall not take shell fish from any beds staked or cultivated by citizens, and that they shall alter all stallions not intended for breeding horses, and shall keep up and confine the latter.

TREATY OF POINT ELLIOTT

January 22, 1855
12 Stat. 927

ARTICLE V. The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting and gathering roots and berries on open and unclaimed lands. *Provided, however,* that they shall not take shell-fish from any beds staked or cultivated by citizens.

TREATY OF POINT NO POINT

January 26, 1855
12 Stat. 933

ARTICLE 4. The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians, in common with all citizens of the United States and of erecting temporary houses for the purpose of curing; together with the privilege of hunting and gathering roots and berries on open and unclaimed lands. *Provided, however,* That they shall not take shell-fish from any beds staked or cultivated by citizens.

TREATY WITH THE MAKAH (TREATY OF NEAH BAY)

January 31, 1855
12 Stat. 939

ARTICLE IV. The right of taking fish and of whaling or sealing at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the United States, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting and gathering roots and berries on open and unclaimed lands: *Provided, however,* That they shall not take shell-fish from any beds staked or cultivated by citizens.

TREATY WITH THE QUINAIELTS

July 1, 1855
12 Stat. 971

ARTICLE III. The right of taking fish at all usual and accustomed grounds and stations is secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing the same; together with the privilege of hunting, gathering roots and berries, and pasturing their horses on all open and unclaimed lands. *Provided, however,* That they shall not take shell-fish from any beds staked or cultivated by citizens; and provided, also, that they shall alter all stallions not intended for breeding, and shall keep up and confine the stallions themselves.

TREATY WITH THE YAKIMAS

June 9, 1855
12 Stat. 951

ARTICLE III. *And provided,* That, if necessary for the public convenience, roads may be run through the said reservation; and on the other hand, the right of way, with free access from the same to the nearest public highway, is secured to them; as also the right, in common with citizens of the United States, to travel upon all public highways.

The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory, and of erecting temporary buildings for curing them; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.

WASHINGTON STATE STATUTES

75.08.012 Duties of the department. It shall be the duty and purpose of the department of fisheries to preserve, protect, perpetuate and manage the food fish and shellfish in the waters of the state and the offshore waters thereof to the end that such food fish and shellfish shall not be taken, possessed, sold or disposed of at such times and in such manner as will impair the supply thereof. For the purpose of conservation, and in a manner consistent therewith, the department shall seek to maintain the economic well-being and stability of the commercial fishing industry in the state of Washington.

75.08.080 Rules and regulations——Scope. The director shall investigate the habits, supply and economic use of, and classify, the food fish and shellfish in the waters of the state and the offshore waters, and from time to time, make, adopt, amend, and promulgate rules and regulations as follows:

(1) Specifying the times when the taking of any or all the various classes of food fish and shellfish is lawful or prohibited.

(2) Specifying and defining the areas, places, and waters in which the taking and possession of the various classes of food fish and shellfish is lawful or prohibited.

(3) Specifying and defining the types and sizes of gear, appliances, or other means that may be lawfully used in taking the various classes of food fish and shellfish, and specifying the times, places, and manner in which it shall be lawful to possess or use the same.

(4) Regulating the possession, disposal, and sale of food fish and shellfish within the state, whether acquired within or without the state, and specifying the times when the possession, disposal, or sale of the various species of food fish or shellfish is prohibited.

(5) Regulating the prevention and suppression of all infectious, contagious, dangerous, and communicable diseases and pests affecting food fish and shellfish.

(6) The fixing of the size, sex, numbers, and

amounts of the various classes of food fish and shellfish that may be taken, possessed, sold, or disposed of.

(7) Regulating the landing of the various classes of food fish and shellfish or parts thereof within the state.

(8) Regulating the destruction of predatory seals and sea lions and other predators destructive of food fish or shellfish, and specifying the proof of the destruction of the same that shall be required.

(9) Specifying the statistical and biological reports that shall be required from licensed or nonlicensed fishermen, dealers, boathouses, handlers, or processors of food fish and shellfish.

(10) Specifying which species of marine and freshwater life are food fish and shellfish.

(11) Classifying the species of food fish and shellfish or parts thereof that may be used for purposes other than human consumption.

(12) Promulgating such other rules and regulations as may be necessary to carry out the provisions of this title and the purposes and duties of the department.

Subdivisions (1), (2), (3), (4), (6), and (7), shall not apply to licensed oyster farms or oysters produced thereon.

APPENDIX B

WASHINGTON STATE COMMERCIAL PASSENGER FISHING VESSEL ASSOCIATION, *Respondent*, v. THOR TOLLEFSON, ET AL, *Appellants*.

WASHINGTON KELPERS ASSOCIATION, *Respondent*, v. THOR TOLLEFSON, ET AL, *Appellants*.

[1] **Fish — Indians — Allocation of Fish Resource — Equal Protection.** An allocation of a major portion of the fish resource of this state to a small percentage of the population on the basis of race or ancestry violates the equal protection provisions of the federal constitution.

[2] **Constitutional Law — Treaties — Supremacy.** That portion of U.S. Const. art. 6 which describes treaties as the supreme law of the land does not exempt treaties or their implementing laws from compliance with constitutional provisions and mandates.

[3] **Fish — Indians — Treaty Rights — State Enforcement — Equal Protection.** Any interpretation of Indian treaties so as to require a substantially disproportionate allocation of the state's fish resource to treaty Indians is prohibited by federal equal protection provisions, and no branch of the state government is permitted under the federal constitution to implement such an interpretation.

STAFFORD, J., and WRIGHT, C.J., concur by separate opinion; UTTER and HOROWITZ, JJ., dissent by separate opinion; DOLLIVER, J., did not participate in the disposition of this case.

Nature of Action: An association of charter boat operators challenged certain state fishing regulations which reduced the daily salmon limit for sports fishermen.

Superior Court: The Superior Court for Thurston County, Nos. 50370, 50552, Gerry L. Alexander, J., found that the regulations were adopted solely as a result of a federal court mandate and, on January 23, 1975, held the regulations invalid on various grounds including equal protection and absence of statutory authority on the part of the Director of Fisheries.

Supreme Court: The court originally dismissed the cause as being moot (87 Wn.2d 417). After granting a

rehearing, the court now holds that the regulations in question were enacted in excess of the Director's authority and violated equal protection provisions of the federal constitution, and also holds that treaties between the United States and Indian tribes are not exempt from compliance with federal constitutional provisions. The judgment is *affirmed*.

Slade Gorton, Attorney General, and *James M. Johnson* and *Dennis D. Reynolds, Assistants*, for appellants.

Thom, Navoni, Hoff, Pierson & Ryder, by *Richard W. Pierson* and *Dale L. Kingman*, for respondents.

ROSELLINI, J.—The majority of this court in *Washington State Commercial Passenger Fishing Vessel Ass'n v. Tollefson*, 87 Wn.2d 417, 553 P.2d 113 (1977), held that the case was moot, since the regulations involved, which were adopted in 1974, have been superseded and are now without force or effect. Upon rehearing, the majority has decided that we should address ourselves to the questions raised on appeal, because they are of a recurring nature and of public importance.

The Washington State Commercial Passenger Fishing Vessel Association (hereinafter referred to as respondent) obtained in the Superior Court a declaration that State fisheries regulations WAC 220-56-013 and -063, which reduced from three to two the daily limit of salmon which a sports fisherman was permitted to catch in ocean waters, were invalid. We sustain that judgment.

Sports fishing for salmon off the Washington and Oregon coast has been a major recreational pursuit for a number of years. Charter boats are taken for hire by sports fishermen in Washington coastal areas for the purpose of catching chinook and coho salmon. The 350 to 400 charter boats constitute a major industry in the area of Ilwaco and Westport on the southern coast of Washington and all of the Olympic Peninsula ports, including Neah Bay, Sekiu, La Push, Agate Beach, Port Angeles, and others. There also exists a charter boat industry in Astoria and other Oregon

fishing ports in the vicinity of the Columbia River which are directly in competition with Ilwaco and indirectly competing with the Westport charter fleet.

At the hearing in the Superior Court, the director was questioned with regard to the reason for the regulations, and stated that they were adopted in response to a decision by Federal District Judge George C. Boldt in *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086, 47 L. Ed. 2d 97, 96 S. Ct. 877 (1976), holding that treaties between the treaty Indians and the United States gave the tribes the right to take a certain percentage of the fish in certain coastal streams. He was asked:

> Q. Were there any other factors for the department and yourself with respect to the regulatory enactments that were adopted in complying with the Boldt Decision? . . . A. Were it not for the Boldt Decision, we would not have taken this action.

He further testified:

> Q. What was the effect of the regulations designed with respect to the coastal areas? A. It was designed to put more fish into the coastal Indian streams.

He testified that the regulation, in conformity with Judge Boldt's ruling, was designed to significantly reduce non-Indian fishing in order to make more fish available to the Indians.

The court made the finding that the regulations were passed solely as a result of the Boldt decision and not in furtherance of the director's powers and duties under the Washington statutes which created his office. These relate to the conservation and preservation of the fishery of the State. The court found that the respondents were irreparably damaged; that there was a sharp decrease in the number of sports fishermen carried on the charter boats, which necessitated a 3- to 6-week recovery period, and that the respondents suffered economic loss. The Superior Court also took note of the fact that the United States District

Court ordered the director to make a significant reduction in non-Indian fishing.

The issues raised by this appeal are: (1) Does the director of the Department of Fisheries have the statutory power to make an unequal allocation of fish among members of the same class of user? (2) Can a Federal District Court order a state official to act beyond the powers vested in the state official by the legislature? and (3) May Congress and the executive department, by treaty, or may a court of law, in interpreting a treaty, ignore and supersede provisions of the federal constitution?

The first two questions were answered in the negative in *Puget Sound Gillnetters Ass'n v. Moos*, 88 Wn.2d 677, 565 P.2d 1151 (1977). *See also Purse Seine Vessel Owners Ass'n v. Moos*, 88 Wn.2d 799, 567 P.2d 205 (1977).

The third, though involving fundamental concepts, has not been argued in this court before.

The Federal District Court in *United States v. Washington, supra*, allocated to the treaty Indians more than 50 percent of the harvestable catch, to wit: the right to take 50 percent of the harvestable salmon and steelhead, plus all of the fish that the Indians can catch on the reservation, where they are not regulated by the State,[1] plus all that they can eat, and all they need for ceremonial purposes.

In addition, under the court's order, the share of salmon and steelhead allocated to the Indians is to be increased by

> [a]n additional equitable adjustment, determined from time to time as circumstances may require, to compensate treaty tribes for the substantially disproportionate numbers of fish, many of which might otherwise be available to treaty right fishermen for harvest, caught by non-treaty fishermen in marine areas closely adjacent to but beyond the territorial waters of the State, or outside

[1]Except as provided in *Puyallup Tribe, Inc. v. Washington Game Department*, 45 U.S.L.W. 4837 (1977).

> the jurisdiction of the State, although within Washington waters.

United States v. Washington, supra at 344.

The Federal District Court ruled that treaty Indians are to be entitled to fish at other than traditional fishing grounds and

> [i]f a tribal member fishes in the all-citizen fishery at a location which is not a usual and accustomed ground or station of his tribe, that individual's catch will not count toward the tribal off-reservation share.[2]

United States v. Washington, supra at 410.

The Federal District Court found all the above rights from its interpretation of article 3 of the Treaty of Medicine Creek, 10 Stat. 1132, 1133 (1854), which states:

> The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, *in common with all citizens of the Territory* . . .

(Italics ours.)

Does the treaty, as thus interpreted, deny to citizens of the state the equal protection of the laws guaranteed under U.S. Const. amend. 14? In exploring that question, it is necessary to take into consideration the following facts:

The number of treaty Indians living in the case area, as identified by the Federal District Court, in proportion to the number of other persons living in the area, is .028 percent. The number of treaty Indians living on the reservation is less than .007 percent of the total tribal membership. The Federal District Court found that only 794 treaty Indians engaged in commercial fishing. The entire population in the Federal District Court case area was 2,243,069. In Western Washington alone there are 6,600 commercial fishermen and 283,650 sports fishermen.

[2]To enforce the federal decision, the Federal District Court proposed to use state resources and the state's power to regulate the taking of fish. Under its orders, the state regulations were not to be confined to or limited to conservation and preservation purposes, or to balancing the interest in on- and off-reservation fishing with conservation measures. The State was required to regulate the taking of fish in offshore waters, which were not a part of the treaty Indians' usual and accustomed fishing grounds, to increase the supply of fish at those places.

Thus, it is apparent that the court awarded over 50 percent of the state's natural resources to a group of its citizens comprising less than 1 percent of the population of the area involved in the decision. The decision was based upon a treaty made not with a foreign nation, but with inhabitants of this Nation who were ancestors of the Indian claimants in this action. The allocation was one which had no precedent in the interpretation of Indian treaties. It had the effect of injecting a new provision into the treaties.

[1] We think that there can be no doubt that were the executive department to enter into a treaty with a foreign nation or were the Congress to pass a law which allocated a portion of a state's natural resources to a group of its citizens, based upon their race or ancestry, that provision would be struck down as a denial of equal protection of the laws. The United States Supreme Court has observed that the language of the treaty, "in common with all citizens of the Territory", invokes the principles of equal protection. *Department of Game v. Puyallup Tribe, Inc.*, 414 U.S. 44, 38 L. Ed. 2d 254, 94 S. Ct. 330 (1973) (*Puyallup* II), was remanded with an admonition that *the issue of equal protection is implicit in the term "in common with" as used in the treaty.*

In *Puyallup Tribe, Inc. v. Department of Game*, 391 U.S. 392, 403, 20 L. Ed. 2d 689, 88 S. Ct. 1725 (1968) (*Puyallup* I), the court had also stated with respect to the term "in common with":

> [W]e only add that any ultimate findings on the conservation issue must also cover the issue of equal protection implicit in the phrase "in common with."

Granted the equal protection clause of the Fourteenth Amendment does not mandate complete equality. But it cannot be seriously argued that an allocation of more than 50 percent of a natural resource of a state to a group of citizens comprising a little more than .028 percent of the population does not deny such protection.

[2] The appellants agree that the result achieved by the Boldt interpretation, were it enacted as a law, would run

afoul of constitutional prohibitions. They suggest, however, that the allocation is immune from constitutional restriction because treaties are the supreme law of the land and are binding within the territorial limits of the United States. While it is true that a treaty is the supreme law of the land under U.S. Const. art. 6, the constitution stands above the treaty in the order of supremacy.

U.S. Const. art. 6 reads, in part:

> *This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land;* and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any *state* to the contrary notwithstanding.

(Italics ours.)

To test the notion that a treaty may supersede the constitution, let us examine a hypothetical case.

Suppose the executive branch of the government should enter into a treaty with the Vatican to the effect that all Catholic churches and schools are to be tax-supported in the United States. And suppose that the United States Senate should ratify the treaty and attempt to implement it by statutes. Would such a treaty or the implementing statutes be enforceable in the United States, in spite of the First Amendment's mandate that "Congress shall make no law respecting an establishment of religion . . ."? Can it be seriously suggested that the courts would enforce such a treaty or laws?

If treaties are indeed supreme over the constitution, the executive and the Senate can, by exercising the treaty-making power, amend the basic document so as to grant rights not found in that instrument or deny rights otherwise mandated.

If this was the intent of the framers, then not only can the exercise of the treaty power effectively amend the constitution so as to preclude the assertion of rights guaranteed under that instrument, but it could just as easily effect

a change in the structure and character of our government itself.

With respect to the supremacy of treaties over acts of Congress, the Supreme Court has said:

> By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control the other, provided always the stipulation of the treaty on the subject is self–executing.

Whitney v. Robertson, 124 U.S. 190, 194, 31 L. Ed. 386, 8 S. Ct. 456 (1888).

Any notion that a treaty may violate any section of the constitution was laid to rest in *Reid v. Covert*, 354 U.S. 1, 16–17, 1 L. Ed. 2d 1148, 77 S. Ct. 1222 (1957). The court stated:

> There is nothing in this language [the supremacy clause] which intimates that treaties and laws enacted pursuant to them do not have to comply with the provisions of the Constitution. Nor is there anything in the debates which accompanied the drafting and ratification of the Constitution which even suggests such a result. . . . It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights—let alone alien to our entire constitutional history and tradition—to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions. In effect, such construction would permit amendment of that document in a manner not sanctioned by Article V.

(Footnote omitted.)

The Supreme Court has further stated:

> The treaty is . . . a law made by the proper authority, and the courts of justice have no right to annul or disregard any of its provisions, unless they violate the Constitution of the United States.

Doe v. Braden, 57 U.S. (16 How.) 635, 656, 14 L. Ed. 1090 (1853). *See Geofroy v. Riggs*, 133 U.S. 258, 267, 33 L. Ed. 642, 10 S. Ct. 295 (1890); *United States v. Wong Kim Ark*, 169 U.S. 649, 700, 42 L. Ed. 890, 18 S. Ct. 456 (1898); *Asakura v. Seattle*, 265 U.S. 332, 341, 68 L. Ed. 1041, 44 S. Ct. 515 (1924).

If a treaty itself may not contravene constitutional provisions, it must follow that an interpretation of a treaty which leaves it open to constitutional objections, is likewise forbidden (*Reid v. Covert, supra*); and certainly laws or regulations which violate a constitutional provision, though they be made pursuant to the terms of a treaty, must fail.

While generally the State has no jurisdiction over persons living on Indian reservations,[3] except as ceded by Congress, its off–reservation jurisdiction has been fully recognized by the Supreme Court in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148–49, 36 L. Ed. 2d 114, 93 S. Ct. 1267 (1973), where it said:

> But tribal activities conducted outside the reservation present different considerations. . . . Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State.

And see Organized Village of Kake v. Egan, 369 U.S. 60, 75, 7 L. Ed. 2d 573, 82 S. Ct. 562 (1962), which states:

> Even where reserved by federal treaties, off–reservation hunting and fishing rights have been held subject to state regulation . . .

Both the State's Enabling Act[4] and the treaties them-

[3] *But see Puyallup Tribe, Inc. v. Department of Game*, 45 U.S.L.W. 4837 (1977).

[4] The State Enabling Act which must be read in conjunction with the treaties, *Ward v. Race Horse*, 163 U.S. 504, 41 L. Ed. 244, 16 S. Ct. 1076 (1896), and

selves (providing for the right to fish "in common") are consistent with the State's jurisdiction over its lands and waters outside the reservation, the only place we are concerned with here. This being the case, the Fourteenth Amendment has full application.

[3] The equal protection clause of the Fourteenth Amendment states that "[n]o state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws."

> Congress may not authorize the States to violate the Equal Protection Clause. . . . Congress is without power to enlist state cooperation in a joint federal–state program by legislation which authorizes the States to violate the Equal Protection Clause.

Shapiro v. Thompson, 394 U.S. 618, 641, 22 L. Ed. 2d 600, 89 S. Ct. 1322 (1969). *See also Katzenbach v. Morgan*, 384 U.S. 641, 651, 16 L. Ed. 2d 828, 86 S. Ct. 1717 (1966).

Whenever the federal law requires the State to act, the State must act in conformity with the Fourteenth Amendment. This rule must also apply to all courts; otherwise, the effect is to give to the judicial branch the power to amend the constitution. This cannot be done. *Reid v. Covert*, *supra*.

We hold that the director of the Department of Fisheries of the State of Washington does not have authority to apportion fish to conform to the Federal District Court decision, that the Federal District Court cannot compel a state officer to act beyond his statutory authority, and that the granting of more than 50 percent of the harvestable fish to .028 percent of the population (treaty Indians) and less

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Mescalero Apache Tribe v. Jones, 411 U.S. 145, 36 L. Ed. 2d 114, 93 S. Ct. 1267 (1973), did not disclaim or surrender to Indians any rights to participate in the common fishery. The Supreme Court in *Martin v. Lessee of Waddell*, 41 U.S. (16 Pet.) 367, 414, 10 L. Ed. 997 (1842), stated:

> And it would require very plain language in these letters–patent, to persuade us that the public and common right of fishery in navigable waters, which has been so long and so carefully guarded in England, and which was preserved in every other colony founded on the Atlantic borders, was intended, in this one instance, to be taken away [from the inhabitants].

than 50 percent to 2,243,069 non–Indian population, violates the equal protection clause of the fourteenth amendment to the United States Constitution.

We affirm the trial court.

HAMILTON, BRACHTENBACH, and HICKS, JJ., and WIEHL, J. Pro Tem., concur.

STAFFORD, J. (concurring in the result only)—Notwithstanding the import of any dissenting or concurring opinions to the contrary, the current decisional law of this state is reflected in *Puget Sound Gillnetters Ass'n v. Moos*, 88 Wn.2d 677, 565 P.2d 1151 (1977); *Purse Seine Vessel Owners Ass'n v. Moos*, 88 Wn.2d 799, 567 P.2d 205 (1977). As indicated therein, and as pointed out in this case, the Department of Fisheries' authority to regulate the salmon fishery is limited to "conservation" purposes.

Inasmuch as the regulations adopted in 1974 have been superseded, the issue before us is moot. Ordinarily we will not resort to mootness as a means of dismissing cases involving issues of great public importance. However, the rule is not applicable here.

The instant record makes it abundantly clear the challenged regulations were not adopted for the purpose of "conservation" but were formulated solely in response to an order of the Federal District Court. That being the case, the Director of Fisheries clearly exceeded the authority granted him by the legislature. To that extent *Puget Sound Gillnetters Ass'n* and *Purse Seine Vessel Owners Ass'n* are fully dispositive of the only real issue before us. Thus, the matter not only is moot but it no longer involves a subject of great public importance, having been previously resolved in the above cited cases.

When an appeal no longer presents the question that originally warranted our retention of a moot case, we should not continue to consider it merely to discuss, by way of dicta, other matters only tangentially related thereto. Despite the temptation to consider matters beyond the

Director's power to regulate the salmon fishery, the discussion is not necessary to the decision and should be eliminated as dicta.

Accordingly, I would dismiss the appeal of the Director of Fisheries as moot.

WRIGHT, C.J., concurs with STAFFORD, J.

UTTER, J. (dissenting)—I have sailed the waters of the Pacific Ocean from Kodiak Island in the north to Maui in the south and most of the bays and inlets of this state. My sympathies are with the men and women who sail these waters and gain their livelihood from them. The oath of office which I took, however, is paramount and binds me to uphold the laws and Constitution of the State of Washington and the Constitution of the United States as well. When there is a conflict between state and federal law, the supremacy clause of the United States Constitution (U.S. Const. art. 6, cl. 2) makes binding upon the states the rulings of the United States Supreme Court. We have recently recognized in a different context that "State and local laws cannot stand if they impede, burden, or frustrate the purpose of [federal laws]." *Lindsay v. Seattle*, 86 Wn.2d 698, 708, 548 P.2d 320 (1976).

The majority opinion holds the apportionment of harvestable fish mandated by the federal courts in *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086, 47 L. Ed. 2d 97, 96 S. Ct. 877 (1976), to be violative of the equal protection clause of the fourteenth amendment to the United States Constitution and therefore not binding upon the State for the reason that treaty fishermen are not members of a distinct group justifying differential treatment. In so holding, the majority completely ignores the most basic principles of Indian treaty law developed over the past 70 years by the United States Supreme Court.

The majority embraces the argument that the treaty clause at issue in *United States v. Washington, supra,*

granting to signatory tribes the right to take fish at "usual and accustomed places in common with all citizens of the territory", violates the equal protection clause of the federal constitution unless interpreted to confer no greater rights than those held by nontreaty citizens. In so doing, the majority asserts that the issue "has not been argued in this court before." In fact, however, the argument has been advanced in substantially similar form before both this court and the United States Supreme Court on several occasions.

The Supreme Court has expressly rejected this theory on at least two occasions. Continued adherence to this discredited doctrine should be embarrassing to this court and is particularly unproductive in this case. I am convinced that, whatever may be the personal inclinations of the members of this court, continued refusal to accept the legal principles enunciated in *Department of Game v. Puyallup Tribe, Inc.*, 414 U.S. 44, 38 L. Ed. 2d 254, 94 S. Ct. 330 (1973) (*Puyallup* II), *Puyallup Tribe, Inc. v. Department of Game*, — U.S. —, 53 L. Ed. 2d 667, 97 S. Ct. 2616 (1977) (*Puyallup* III), and *United States v. Washington, supra,* will place upon us significant responsibility for whatever unfortunate events hereafter transpire.

Treaty fishermen are undeniably a unique class under well-established principles of federal law which this court is powerless to ignore. Treaty fishermen may, therefore, be treated as a distinct class of users for purposes of regulation without trammeling upon principles of equal protection. It cannot seriously be argued that the Director of the Department of Fisheries lacks power to allocate fish between distinct and competing user groups for purposes of conservation and systematic exploitation of the resource. Such allocation has been the principal effect of department regulation for many years. I would recognize the continuing power in the director to promulgate regulations for the purposes of conservation even though they have the effect

of allocating fish between distinct user groups, including treaty fishermen, and would reverse the trial court.

I

INDIAN TREATY RIGHTS AND EQUAL PROTECTION

The majority opinion proceeds from the presumption that treaty and nontreaty fishermen possess identical rights to the state fishery and cannot lawfully be placed in separate categories for purposes of regulation. An examination of United States Supreme Court decisions interpreting the crucial clause of the Treaty of Medicine Creek and similar provisions in other treaties[5] establishes this is not the law. Native Americans who are beneficiaries of treaties negotiated by our government with their ancestors possess rights to the fish in our waters which clearly exceed those of ordinary citizens.

United States v. Winans, 198 U.S. 371, 49 L. Ed. 1089, 25 S. Ct. 662 (1905), is the first of a long series of cases decided by the Supreme Court from this jurisdiction and concerns the scope of the rights conferred by the fishing provision at issue here. The issue presented in *Winans* was framed by the court as follows, at page 379:

> The pivot of the controversy is the construction of the second paragraph. Respondents contend that the words "the right of taking fish at all usual and accustomed places *in common* with the citizens of the Territory" confer only such rights as a white man would have under the conditions of ownership of the lands bordering on the river, and under the laws of the State, and, such being the rights conferred, the respondents further contend that they have the power to exclude the Indians from the river by reason of such ownership.

The principles enunciated by the court in answering this contention established the basic precepts which continue to control this area of law.

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[5]A typical provision reads:

"The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory . . ." Article 3, Treaty of Medicine Creek, 10 Stat. 1132, 1133 (1854).

> The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed. New conditions came into existence, to which those rights had to be accommodated. Only a limitation of them, however, was necessary and intended, not a taking away. In other words, the treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted. . . . There was an exclusive right of fishing reserved within certain boundaries. There was a right outside of those boundaries reserved "in common with citizens of the Territory." As a mere right, it was not exclusive in the Indians. Citizens might share it, but the Indians were secured in its enjoyment by a special provision of means for its exercise. They were given "the right of taking fish at all usual and accustomed places," and the right "of erecting temporary buildings for curing them." The contingency of the future ownership of the lands, therefore, was foreseen and provided for—in other words, the Indians were given a right in the land—the right of crossing it to the river—the right to occupy it to the extent and for the purpose mentioned. No other conclusion would give effect to the treaty.

United States v. Winans, supra at 381. The court then held that neither the State nor an abutting landowner could exclude the Indians from access to their usual and accustomed fishing grounds. The decision clearly established over 70 years ago that treaty Indians possess rights distinct from those of ordinary citizens.

The opinion in *Winans* recognized a principle of treaty interpretation which retains crucial importance in evaluating equal protection arguments raised with respect to treaty Indian rights. The rights and powers which Indian treaties establish are not *grants* of power *to* the Indians, but rather *surrender* of rights *from* them. Thus, rights not explicitly given up are rights *reserved* by the Indians. The importance of this principle in the current case results from its

impact upon proper interpretation of the phrase, "in common with." In *Winans* the Supreme Court reversed a lower court decision limiting the Indians to only the same fishing rights as others had. Using reserved rights analysis, Justice McKenna pointed to the absurdity of this interpretation; it was hardly reasonable to conclude that the Indians had been willing to give up all of their independent fishing rights in their entirety. In an oft–quoted passage, Justice McKenna discussed the decision of the lower court and evaluated it, at page 380:

> The remarks of the court clearly stated the issue and the grounds of decision. The contention of the respondents was sustained. In other words, it was decided that the Indians acquired no rights but what any inhabitant of the Territory or State would have. Indeed, acquired no rights but such as they would have without the treaty. This is certainly an impotent outcome to negotiations and a convention, which seemed to promise more and give the word of the Nation for more.

Winans stands unequivocally for the proposition that "in common with" does not limit Indian fishing rights to those which others may also exercise. Thus, the *Winans* decision is itself a clear recognition of the separate character *and separate source* of Indian treaty rights; while the ordinary United States citizen has rights as defined by the constitution and subject to limitation by the proper exercise of the police power of the states, treaty Indians *retain rights as established under treaty* prior to the grant of United States citizenship to the Indians.[6]

[6]Complementing the reserved rights analysis of *United States v. Winans*, 198 U.S. 371, 49 L. Ed. 1089, 25 S. Ct. 662 (1905), are the principles of treaty construction mandating that (1) doubts and ambiguities are to be resolved in favor of the Indians, and (2) the treaties are to be construed as the Indians understood them. *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 25 L. Ed. 2d 615, 90 S. Ct. 1328 (1970); *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 36 L. Ed. 2d 129, 93 S. Ct. 1257 (1973). These principles are so well established as to be beyond the necessity for comment, but they do underscore the propriety—indeed, the *necessity*—of recognizing that the treaties reserve to the Indians rights which others simply do not have. Because the source of Indian fishing rights is different from that of others, a distinction between the rights of these two groups with respect to the *scope* of those rights cannot run afoul of equal protection guaranties.

Tulee v. Washington, 315 U.S. 681, 86 L. Ed. 1115, 62 S. Ct. 862 (1942), involved a challenge by a member of the Yakima Tribe to his conviction for fishing without a state license. The court held:

> [W]hile the treaty leaves the state with power to impose on Indians, equally with others, such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish, it forecloses the state from charging the Indians a fee of the kind in question here.
>
> In determining the scope of the reserved rights of hunting and fishing, we must not give the treaty the narrowest construction it will bear. In *United States v. Winans*, 198 U.S. 371, this Court held that, despite the phrase "in common with citizens of the Territory," Article III conferred upon the Yakimas continuing rights, beyond those which other citizens may enjoy, to fish at their "usual and accustomed places: in the ceded area; . . .

(Footnote omitted.) *Tulee v. Washington, supra* at 684.

The extent of the power of the State to regulate the treaty fishery for the conservation purposes recognized in *Tulee* was the next issue faced by the Supreme Court. In *Puyallup Tribe, Inc. v. Department of Game*, 391 U.S. 392, 20 L. Ed. 2d 689, 88 S. Ct. 1725 (1968) (*Puyallup* I), the State sought an injunction against fresh water set net fishing by treaty Indians. The Supreme Court responded by reiterating its prior holdings to the effect that the State had power to regulate the off reservation treaty fishery where necessary for the conservation of fish, but pointed out that this standard is *"distinct from the federal constitutional standard concerning the scope of the police power of a State."* (Italics mine.) *Puyallup* I at 402 n.14. The court also dismissed the argument that the statutes granting citizenship to Indians altered or abrogated their preexisting treaty rights, stating: "The right to fish 'at all usual and accustomed' places *may*, of course, *not be qualified* by the State, *even though* all Indians born in the United States are now *citizens* of the United States." (Italics mine.)

Puyallup I at 398. Thus, *Puyallup* I directly contradicts the assertions by the majority here that the Indians' present status as citizens allows the equal protection clause to be utilized to abrogate established treaty rights.

Puyallup I was remanded for further findings on the conservation issue with the admonition that such findings "must cover the issue of equal protection implicit in the phrase 'in common with'". *Puyallup* I at 403. The majority mistakenly seizes upon this language as supportive of its position that treaty Indians have no greater rights than other citizens. Subsequent decisions of that court refute the majority's interpretation; it is now clear that the thrust of the court's equal protection concern is directed at securing full state respect for the rights of treaty fishermen.

Following the remand in *Puyallup* I, this court upheld fisheries regulations allowing a treaty net fishery for salmon and denying special rights to treaty fishermen as to steelhead. Both parties petitioned the Supreme Court for review and consolidated writs of certiorari were granted. *See Department of Game v. Puyallup Tribe, Inc.*, 414 U.S. 44, 38 L. Ed. 2d 254, 94 S. Ct. 330 (1973) (*Puyallup* II). In its petition for writ of certiorari in *Puyallup* II, the State Department of Game listed as one of the grounds for Supreme Court review:

> The failure of the court, in the opinion below [*i.e.*, 80 Wn.2d 561] to hold that state conservation laws may be applied to Indian and non–Indian citizens on an equal basis in off–reservation waters violated the Equal Protection Clause adverted to by Justice Douglas in expressing the view for a unanimous court in the Puyallup opinion at 403.

Petition for Writ of Certiorari on behalf of the State of Washington Department of Game, United States Supreme Court cause No. 72–481, at 10. An examination of the briefs presented to the Supreme Court in that case confirms that the analysis embraced by the majority here was presented

to the Supreme Court in *Puyallup* II.[7] Such an analysis was expressly rejected in *Puyallup* II. The issue presented was framed thusly by the court:

> The ban on all net fishing in the Puyallup River for steelhead grants, in effect, the entire run to the sports fishermen. Whether that amounts to discrimination under the Treaty is the central question in these cases.

(Footnote omitted.) *Puyallup* II at 46–47. Though it was conceded that the Indians were free to pursue steelhead as sports fishermen, the court held the treaty granted to the treaty tribes special rights to a portion of the catch, over and above that enjoyed by others.

> If hook–and–line fishermen now catch all the steelhead which can be caught within the limits needed for escapement, then that number must in some manner be *fairly apportioned* between Indian net fishing and non–Indian sports fishing . . .
>
> The aim is to *accommodate* the *rights of Indians under the Treaty and the rights of other people.*

(Italics mine.) *Puyallup* II at 48–49. *Puyallup* II clearly establishes that Indians fishing pursuant to a treaty possess special rights and constitute a distinct class of fishermen. The conclusion that the type of equal protection argument advanced here by the majority was expressly rejected in *Puyallup* II is inescapable.[8]

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[7] A similar argument has also been considered and rejected by a majority of this court. *See Department of Game v. Puyallup Tribe, Inc.*, 80 Wn.2d 561, 497 P.2d 171 (1972). Indeed, Justice Hale in dissent castigated the majority for its rejection of the equal protection analysis which the State had urged upon this court. Further, the majority opinion in that case made clear the court's recognition at that time of the distinct and separate status of treaty fishermen, a recognition which the majority's opinion in this case retracts without explicitly overruling, citing, or even acknowledging its prior analysis. It is particularly difficult to understand this court's current departure from its prior position, especially when that position was so clearly in harmony with the binding Supreme Court precedents, a distinction which the position of the majority in this case cannot enjoy.

[8] The statement in the majority opinion concerning the terms of the remand in *Puyallup* II is unfortunately inaccurate and therefore misleading. The majority asserts that *Puyallup* II was remanded with an admonition that the issue of equal protection is implicit in the term "in common with." The implication is that the majority's equal protection theory was recognized by the court in *Puyallup* II.

Puyallup II also establishes that this special class of fishermen, in addition to other rights such as those enunciated in *Winans* and *Tulee*, is entitled to a fair portion of harvestable fish covered by the treaty and that what constitutes a "fair portion" is to be decided on a case–by–case basis on the facts presented.

> What formula should be employed is not for us to propose. There are many variables—the number of nets, the number of steelhead that can be caught with nets, the places where nets can be located, the length of the net season, the frequency during the season when nets may be used. On the other side are the number of hook–and–line licenses that are issuable, the limits of the catch of each sports fisherman, the duration of the season for sports fishing, and the like.

Puyallup II at 48–49.

Subsequent Supreme Court decisions reinforce this analysis. *Antoine v. Washington*, 420 U.S. 194, 43 L. Ed. 2d 129, 95 S. Ct. 944 (1975), concerned the scope of the treaty hunting rights of Colville Indians under a similar treaty provision. This court had upheld convictions for hunting out of season in violation of state law, rejecting a treaty defense. The Supreme Court reversed, again recognizing that Indian tribal members have special rights under their treaties.

> Finally, the opinion of the State Supreme Court construes Art. 6 as merely a promise by the United States that so long as it retained any ceded land and allowed others to hunt thereon, Indians would be allowed also to hunt there. 82 Wash. 2d, at 449–450, 511 P.2d, at 1357–1358. But the provisions of Art. 6 that the preserved rights are not exclusive and are to be enjoyed "in common with all other persons," does not support that interpretation or affect the Supremacy Clause's preclusion of qualifying state regulation. Non–Indians are, of course, not beneficiaries of the preserved rights, and the State remains wholly free to prohibit or regulate non–Indian hunting and fishing. The ratifying legislation must be construed to *exempt the Indians' preserved rights from like state regulation* . . .

(Italics mine.) *Antoine v. Washington, supra* at 205–06. Justice Douglas, in a concurring opinion, further clarified his opinions in *Puyallup* I and *Puyallup* II, stating:

> *It has long been settled* that a grant of rights—in the first case, fishing rights—on an equal footing with citizens of the United States would not be construed as a grant only of such rights as other inhabitants had. As stated in *United States v. Winans*, 198 U.S. 371, 380 (1905): "This is certainly an impotent outcome to negotiations and a convention, which seemed to promise more and give the word of the Nation for more." That was our view in *Puyallup Tribe v. Department of Game*, 391 U.S. 392 (1968). A "right" which the Federal Government grants an Indian may "not be qualified or conditioned by the State," *id.*, at 399.
>
> I agree with the Court that conservation measures, applicable to all, are available to the State, *id.*, at 398–403; but *discrimination against the Indians* by conservation measures is not permissible, *Washington Game Dept. v. Puyallup Tribe*, 414 U.S. 44, 48 (1973). . . . The State boldly claims that its power to exact a hunting license from all hunters qualifies even the Indians' right to hunt granted by Congress, irrespective of any conservation need. A State may do that when it comes to non–Indians or to Indians with no federal hunting rights, *Lacoste v. Department of Conservation*, 263 U.S. 545, 549 (1924). *But Indians with federal hunting "rights" are quite different.*

(Italics mine.) *Antoine v. Washington, supra* at 211–12. Thus, after *Antoine* there could be no doubt that (1) the phrase "in common with" is *not* to be construed as merely giving the treaty Indians the same rights that others had, as the majority's fallacious analysis does; and (2) Indians possessing rights under treaties constitute a special and separate class for constitutional purposes.

One year after *Antoine* the United States Supreme Court denied certiorari in *United States v. Washington, supra*.

Puyallup II was not, however, remanded with such an admonition. Such a statement only appears in the *Puyallup* II opinion in the introductory paragraphs explaining the holding in *Puyallup* I. The preceding comments show that this admonition was not intended to carry the meaning given it by the majority here. There not only is no statement in *Puyallup* II which supports the majority, rather the entire opinion refutes it.

The opinion of the Ninth Circuit in that case, which affirmed the District Court, rests squarely upon the "fair portion" holding of *Puyallup* II. *See United States v. Washington*, 520 F.2d 676, 687–88 (9th Cir. 1975). The Ninth Circuit recognized the treaty Indians' right to an equitable apportionment of the harvestable fish, which was mandated by *Puyallup* II, and held the apportionment ordered by the District Court was within the trial judge's discretion as a court of equity devising an apportionment. This is entirely consistent with the Supreme Court 's holding in *Puyallup* II and adds nothing new to it. The Ninth Circuit specifically did not rest its decision upon the necessity of a precise 50 percent apportionment of fish to the treaty tribes. It held the District Court had applied the appropriate legal principles (*i.e.*, the necessity for an equitable apportionment) and reviewed the precise allocation made only for abuse of discretion. The Supreme Court predictably denied certiorari in this case because it presented no questions which the court had not passed upon in *Puyallup* II.

The Supreme Court's most recent pronouncements in this field are contained in *Puyallup* III, which arose as a result of the remand in *Puyallup* II and subsequent decision of this court in the same case. *See Department of Game v. Puyallup Tribe, Inc.*, 86 Wn.2d 664, 548 P.2d 1058 (1976). In its opinion following remand this court upheld an allocation of 45 percent of the natural run of steelhead to Indian fishermen. In an expansive bit of dicta the majority invited the Supreme Court to reconsider its interpretation of the treaty provision. The State, in its petition for writ of certiorari, presented once again to the Supreme Court essentially the same argument which the majority here has submitted to be unique, and indeed recognized that this issue had been previously decided. In his petition the Attorney General stated:

> We recognize that the Court [*i.e.*, the United States Supreme Court] has ruled upon this issue in Puyallup II 414 U.S. 44 . . .

Response to Petition for Certiorari and Cross Petition by State of Washington Department of Game, Supreme Court cause No. 76–423, at 24. It can hardly be said that the equal protection argument advanced in this case is new or unique. The Supreme Court affirmed the 45 percent allocation in *Puyallup* III.

To summarize, the federal cases establish that treaty Indians enjoy a specific federal right, or occupy a special class, *entitled to take fish at specific locations*. In part this is a property right, including an easement across even privately owned adjacent land to gain access to a reserved fishing site. *United States v. Winans, supra*. The exemption from taxation established in *Tulee v. Washington, supra*, is yet another aspect of this right, being an immunity which even the fee owner of riparian property may not assert. But these attributes do not exhaust the scope of the treaty clause. The treaty also provides protection from state regulation which effectively and unnecessarily destroys the right to take fish set forth by the treaty provision. In order to regulate the treaty fishery the State must show that its regulation is a reasonable and necessary conservation measure *and* that its application to the Indians is necessary in the interests of conservation. *Tulee v. Washington, supra; Department of Game v. Puyallup Tribe, Inc., supra* (*Puyallup* II); *Antoine v. Washington, supra*. Finally, the State must also "fairly apportion" the harvestable run of fish remaining available after such regulation between treaty fishermen and others. *See Puyallup* II; *United States v. Washington, supra*.

When these special rights are contrasted with those of ordinary citizens it is apparent that federal law has established that two distinct classes of fishermen exist in the state of Washington. It is settled law that the State is free to enact regulations prescribing the terms upon which private citizens may take possession of fish found in this state's waters because those fish are the property of the sovereign. *Washington Kelpers Ass'n v. State*, 81 Wn.2d 410, 502 P.2d 1170 (1972), *cert. denied*, 411 U.S. 982 (1973);

State v. Moses, 79 Wn.2d 104, 483 P.2d 832 (1971), *cert. denied*, 406 U.S. 910 (1972); *Vail v. Seaborg*, 120 Wash. 126, 207 P. 15 (1922). State regulations may not, however, be applied to treaty fishermen in a manner which conflicts with their aforementioned rights under federal treaties. Indian treaties have the same force and effect as treaties with foreign nations. As such, they are a part of the supreme law of the land and are binding upon the states, state laws to the contrary notwithstanding. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 8 L. Ed. 483 (1832); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 8 L. Ed. 25 (1831). The fact that Indians have since been made citizens of the United States in no way impairs the continued validity of their treaty rights or the obligation of the states to respect them. *See Puyallup* I.

The majority contends the Department of Fisheries may not enact regulations for purposes of conservation which result in an allocation of fish between treaty and nontreaty fishermen because to do so would result in a discriminatory allocation of fish between members of the same class. The opinion rests upon a false premise. As has been clearly demonstrated, treaty and nontreaty fishermen are in fact members of different classes and may be treated differently without violating the precepts of equal protection.

> Article I, § 12 of the state constitution and the fourteenth amendment to the Federal constitution, prohibiting special privileges and immunities and guaranteeing equal protection of the laws, require that *class legislation must apply alike to all persons within a class, and reasonable ground must exist for making a distinction between those within, and those without, a designated class.* Within the limits of these restrictive rules, the legislature has a wide measure of discretion, and its determination, when expressed in statutory enactment, cannot be successfully attacked unless it is manifestly arbitrary, unreasonable, inequitable, and unjust.

Washington Kelpers Ass'n v. State, supra at 421, quoting *Clark v. Dwyer*, 56 Wn.2d 425, 435–36, 353 P.2d 941 (1960).

Contrary to the assertion in *Puget Sound Gillnetters Ass'n v. Moos*, 88 Wn.2d 677, 565 P.2d 1151 (1977), the proposed regulations do not result in classification on the basis of race, but upon rights under federal treaties. Many native Americans do not possess the special treaty rights which the federal courts have ordered this State to respect. Treaty Indians possess vested rights which set them apart from ordinary citizens and establish them as a distinguishable class for purposes of state regulation. There is no violation of equal protection here.

II

THE SCOPE OF THE DIRECTOR'S REGULATORY POWERS

The Director of Fisheries' regulatory powers are set forth principally in three statutes, RCW 75.08.012; .020; .080. These statutes are clearly designed to allow the director to enact regulations to conserve the state fishery in order to preserve and enhance the industry's economic viability. The director's duties in this regard are set forth in mandatory terms in RCW 75.08.012.

> It shall be the duty and purpose of the department of fisheries to preserve, protect, perpetuate and manage the food fish and shellfish in the waters of the state and the offshore waters thereof to the end that such food fish and shellfish shall not be taken, possessed, sold or disposed of at such times and in such manner as will impair the supply thereof. For the purpose of conservation, and in a manner consistent therewith, the department shall seek to maintain the economic well–being and stability of the commercial fishing industry in the state of Washington.

The more specific provisions of RCW 75.08.020 and .080[9] are consistent with this general mandate. In order to effectively exercise the mandatory duties imposed upon him by

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[9] "The director shall devote his time to the duties of his office and enforce the laws and regulations of the director relating to propagation, protection, conservation, preservation, and management of food fish and shellfish." RCW 75.08.020.

"The director shall investigate the habits, supply and economic use of, and classify, the food fish and shellfish in the waters of the state and the offshore

statute, it is essential that this court recognize the power of the director to enact regulations which he finds necessary to preserve and promote the fisheries resource in light of the new demands placed upon it by virtue of federal court decisions which are binding upon the state. As pointed out by Justice Horowitz in his dissent in *Puget Sound Gillnetters Ass'n v. Moos*, 88 Wn.2d 677, 693–94, 565 P.2d 1151 (1977):

> *United States v. Washington, supra* at 389–93, 399–412, 413–20, and particularly at page 416, held that the Department of Fisheries and its director had the authority and were indeed obligated under the supremacy clause to refrain from violating the District Court injunction. Indeed, the defendants, including the Department of Fisheries and its director, are specifically ordered to "fully observe and to the best of their ability carry out the provisions and purposes of the treaties cited in paragraph 1 of the Findings of Fact," and "conform their regulatory action and enforcement to each and all of the standards set forth in Final Decision #1." *United States v. Washington, supra* at 414. This provision is now final in the federal court system and the Department of Fisheries and its director are bound by the injunction. Moreover, as *United States v. Washington, supra* at 402 states: "Because the right of each treaty tribe to take

waters, and from time to time, make, adopt, amend, and promulgate rules and regulations as follows:

"(1) Specifying the times when the taking of any or all the various classes of food fish and shellfish is lawful or prohibited.

"(2) Specifying and defining the areas, places, and waters in which the taking and possession of the various classes of food fish and shellfish is lawful or prohibited.

"(3) Specifying and defining the types and sizes of gear, appliances, or other means that may be lawfully used in taking the various classes of food fish and shellfish, and specifying the times, places, and manner in which it shall be lawful to possess or use the same.

". . .

"(6) The fixing of the size, sex, numbers, and amounts of the various classes of food fish and shellfish that may be taken, possessed, sold, or disposed of.

"(7) Regulating the landing of the various classes of food fish and shellfish or parts thereof within the state.

". . .

"(12) Promulgating such other rules and regulations as may be necessary to carry out the provisions of this title and the purposes and duties of the department." RCW 75.08.080.

> anadromous fish arises from a treaty with the United States, that right is reserved and protected under the supreme law of the land, does not depend on state law, is distinct from rights or privileges held by others, and may not be qualified by any actions of the state."

To fail to recognize this binding ruling at this point will only further imperil the resource itself and insure that the State will lose a substantial amount of control over this vital resource to the federal government and those agencies which ultimately are vested with control of the treaty fishery. Such a result is certainly counterproductive. The refusal of our state courts to accept as binding the pronouncements of federal courts with regard to the federal rights of treaty fishermen has already contributed to a substantial loss of state control over the state fisheries resource. The federal government has now entirely preempted the power of the states to manage the offshore fishery beyond the territorial limits of the state. *See Northwest Trollers Ass'n v. Moos*, 89 Wn.2d 1, 568 P.2d 793 (1977). Federal enforcement officers also patrol our inland waters, utilizing the federal contempt power to enforce federal rights which our state courts have chosen in many instances to ignore. The state fisheries director has himself been placed in personal jeopardy by the federal court for alleged refusal to comply with its orders. The state fisheries resource has suffered considerably from the absence of a consistent comprehensive management policy throughout this lengthy legal entanglement. More importantly, this controversy has escalated to the point at which the lives and property of individual citizens are in peril. It would be painfully naive to assert that this court's reluctance to recognize the validity of the decisions of the United States Supreme Court and other federal courts with regard to the treaty fishery is not at least in part responsible for this situation.

In *Gillnetters* the majority recognized that the director possesses the power to allocate fish between competing claimants for the purpose of conservation. *Puget Sound*

Gillnetters Ass'n v. Moos, supra at 683. It held, however, that this power did not include authority to allocate fish between competing claimants of the *same class*. As the previous discussion shows, treaty and nontreaty fishermen are not "of the same class" and the *Gillnetters* decision is therefore not controlling.

Gillnetters also mistakenly rests upon the proposition that the United States Supreme Court has not construed the treaty provision in a manner which is binding upon the State. This is also incorrect. *Puyallup* II expressly holds that the treaty clause entitles its beneficiaries to take a fair portion of the harvestable fish. The subsequent decision in *United States v. Washington, supra,* is expressly based upon the controlling rule of law enunciated in *Puyallup* II. This court is, of course, *not* free to interpret the treaty clause in a manner inconsistent with *Puyallup* II. The allocation ordered against the State by the District Court in *United States v. Washington, supra,* has been held to be within the trial court's discretion under the fair portion rule by the Ninth Circuit and the Supreme Court has denied certiorari, making that judgment final and binding upon the State as a party to that action.

Given all this, the simple fact is that, if the director is not allowed to promulgate regulations for the conservation of the fishery which reflect the competing rights of treaty and nontreaty fishermen, someone else will. The regulations promulgated by the department under these statutes have for many years resulted in allocation of fish between competing classes of user groups such as commercial and noncommercial, seiners and gillnetters, etc. A new class now exists which it is both logical and necessary that the director take into account. To hold that he is without power to do so is both inconsistent with established law and will but assure that the legislative purpose set forth in RCW 75.08-.012 will be entirely frustrated.

> The words "conservation" and "management" in the applicable statutes are broad enough to encompass the

> principles of allocation embodied in the challenged regulations. Allocation is an important factor in the conservation of fish runs. Where a resource is not presently plentiful enough to satisfy all needs, a restriction on withdrawal must be instituted in order to conserve the renewable resource and insure its availability in the future.

Washington State Commercial Passenger Fishing Vessel Ass'n v. Tollefson, 87 Wn.2d 417, 423-24, 553 P.2d 113 (1976) (Utter, J., dissenting).

The majority opinion misconstrues cases and ignores binding precedent. It reaches a result which can only make a poor situation much worse for all citizens of our state. I dissent.

HOROWITZ, J., concurs with UTTER, J.

APPENDIX C

THE SUPREME COURT OF WASHINGTON

No. 44401

ORDER

DENYING MOTION FOR RECONSIDERATION

PUGET SOUND GILLNETTERS ASSOCIATION, ET AL,
Petitioners,

v.

DONALD MOOS, ET AL,
Respondents.

The Court having decided by a vote of five to three that the respondents' petition for reconsideration should be denied,

It is ordered that the petition be and it hereby is denied.

Dated this 10th day of October, 1977.

/s/ Charles A. Wright,
Chief Justice

APPENDIX D

[No. 4401. En Banc. June 9, 1977.]

PUGET SOUND GILLNETTERS ASSOCIATION, ET AL,
Petitioners, v. DONALD MOOS, ET AL,
Respondents.

[1] Fish — State Regulation — Department of Fisheries — Statutory Authority. The authority of the Department of Fisheries to regulate commercial salmon fishing (RCW Title 75) is limited to conservation purposes, *viz.*, to prevent harvesting of fish required for natural or artificial spawning. It has no power to allocate fish among users of the same class.

[2] Fish — Indians — State Conservation Rules — Treaty Indians. Indians, as citizens of the United States and this state, are bound by constitutional requirements of equal protection and prohibitions against special privileges and immunities. Distinction based upon a fisherman's race is improper, and unequal treatment of commercial fishermen based upon their being Indian or non-Indian would be unconstitutional.

[3] States — Federal Court Mandate — Statutory Agencies. Federal courts cannot order state agencies to affirmatively act in excess of their statutory authority.

[4] Fish — Indians — Treaties — Jurisdiction. Federal district courts do not have jurisdiction to the exclusion of state courts to

interpret Indian treaties which affect important interests of the state.

HOROWITZ, STAFFORD, and UTTER, JJ., dissent in part by separate opinions; DOLLIVER and HICKS, JJ., did not participate in the disposition of this case.

Nature of Action: The petitioners, an individual and a commercial fishing association, filed an original action against a state officer (Director of Fisheries) in the nature of mandamus. The petitioners sought a writ requiring the director to restrict fishing regulations to those necessary for conservation and to treat Indian and non–Indian fishermen equally.

Supreme Court: The court holds that the Department of Fisheries has no power to regulate fishing except for conservation purposes and that equal protection concepts require that fishing regulations apply equally to Indian and non–Indian commercial fishermen. The court further holds that it is not bound by federal district court judgments in this matter and that the federal court cannot require the Department of Fisheries to act beyond its statutory authority. No writ is issued on the basis that the director will voluntarily abide by the court's decision.

Douglas M. Fryer, Jacob A. Mikkelborg, Charles E. Yates, and *Henry Haugen* (of *Moriarty, Long, Mikkelborg & Broz),* for petitioners.

Slade Gorton, Attorney General, and *James M. Johnson* and *Dennis D. Reynolds, Assistants,* for respondents.

Joseph T. Mijich and *John P. World,* for intervenors.

Peter R. Taft and *Edmund B. Clark* on behalf of United States Department of Justice and *Alan C. Stay, John Clinebell, Steven S. Anderson,* and *Mason D. Morisset* on behalf of Lummi, Makah, Quileute, Puyallup, Muckleshoot, and Skokomish Indian Tribes, amici curiae.

ROSELLINI, J.—Petitioners are commercial gillnet fishermen who harvest salmon in the waters of Washington state.

They seek a writ of mandate ordering the Director of Fisheries to issue regulations which apply equally and in a nondiscriminatory fashion to both treaty and nontreaty fishermen. They further ask that the Department of Fisheries be ordered to confine its regulation of commercial gillnet fishing to conservation purposes. They also request a declaration that treaty Indians do not have a greater right of access to hatchery–reared fish than do non–Indian fishermen.

By statute, RCW 75.12.010, the Coho season opens on the second Monday of September and lasts through the 30th day of November, unless the Department of Fisheries provides otherwise. This year, according to department estimates, there will be 702,750 Coho salmon available for harvesting after allowing for escapement for the enhancement of future runs. The total estimated market value of the Coho available for harvesting this year is approximately $5 million.

The legislature has declared:

> The preservation of the fishing industry and food fish and shellfish resources of the state of Washington is vital to the state's economy, and effective measures and remedies are necessary to prevent the depletion of these resources.

Laws of 1973, 1st Ex. Sess., ch. 220, § 1, p. 1700.

The federal district court for the Western District of Washington, in *United States v. Washington,* 384 F. Supp. 312 (W.D. Wash. 1974), construed the Medicine Creek and other Indian treaties and held that treaty fishermen were entitled to 50 percent of the harvestable salmon in Puget Sound, plus such salmon as are necessary for ceremonial and subsistence purposes.

This court, in *Department of Game v. Puyallup Tribe, Inc.,* 86 Wn.2d 664, 548 P.2d 1058 (1976), on a direct remand from the United States Supreme Court, *Department of Game v. Puyallup Tribe,* 414 U.S. 44, 38 L. Ed. 2d 254, 94 S. Ct. 330 (1973), interpreted the same treaty language to mean that the right accorded the Indians under

the Medicine Creek treaty to fish "in common with others" was a right, not to a certain number or percentage of fish, but to an equal opportunity to fish. We further held that if the treaties guarantee more than this to the Indian signatories, then hatchery–reared fish were beyond the scope of the treaty.

In response to these conflicting court decisions, the department issued a regulation which was designed to allot to treaty Indians 554,400 of the 702,750 Coho available for harvest.

The Superior Court for Thurston County has heard a number of suits[1] challenging the right of the department to promulgate regulations for the apportionment of the catch rather than for conservation purposes. That court has consistently held that regulations promulgated to facilitate the federal court's ruling rather than for the purpose authorized by statute—that of conservation—are beyond the authority of the Department of Fisheries and therefore void.

The Department of Fisheries, in its arguments in open court, requested that the court define its authority in regard to regulation for conservation purposes and to declare whether it has the right to allocate fish. Because of the uniqueness of its position and its evident good faith in attempting to carry out its duties, we decline to issue a writ of mandate but will set forth our opinion upon the questions concerning the authority of the department. We have full confidence that the director will abide by our decision.

The Department of Fisheries, a statutory agency of the state, is established by RCW Title 75, which also defines the extent of its authority to act. RCW 75.08.012 sets forth the duties and purposes of the department. It provides that it shall be its duty to

[1]An example of these cases is seen in *Washington State Commercial Passenger Fishing Vessel Ass'n v. Tollefson*, 87 Wn.2d 417, 553 P.2d 113 (1976). Some other cases have been Antone v. Tollefson, Thurston County cause No. 46427; Columbia River Fishermen's Protective Ass'n v. Moos, Thurston County cause No. 55339; Schroeder v. Moos, Thurston County cause No. 55387.

> preserve, protect, perpetuate and manage the food fish and shellfish in the waters of the state and the offshore waters thereof to the end that such food fish and shellfish shall not be taken, possessed, sold or disposed of at such times and in such manner as will impair the supply thereof. For the purpose of conservation, and in a manner consistent therewith, the department shall seek to maintain the economic well–being and stability of the commercial fishing industry in the state of Washington.

This court has previously considered the meaning of substantially the same language used with reference to the Department of Game's authority to act. In the case of *Hartman v. State Game Comm'n*, 85 Wn.2d 176, 532 P.2d 614 (1975), this court looked to RCW 77.12.010, which provided as follows:

> The game animals . . .*shall be preserved, protected, and perpetuated*, and *to that end* such game animals . . . shall not be taken at such times or places, by such means, in such manner, or in such quantities *as will impair the supply thereof.*

(Italics ours.) We determined that this language gave to the Department of Game the authority to act in matters of conservation only.

The Washington State Legislature has established, in RCW 75.12.010, a fishing season for salmon. The statute provides:

> [S]ubject to such seasons and regulations as may be established from time to time by the director, it shall be lawful to fish for commercial purposes . . . for other legal salmon from the second Monday of September to and including the thirtieth day of the following November, except during the hours beginning 4:00 o'clock p.m. of Friday and ending 4:00 o'clock p.m. of the Sunday following . . .

By the terms of this statute, salmon fishing in Puget Sound is open after the second Monday in September unless closed by the regulations of the department. Here, the department is authorized to perform a specific act, but the statute contains in itself no guidelines or limitations.

These are found in RCW 75.08.012, which declares it to be the duty of the department to protect the supply of fish.

A further specific direction is contained in the third proviso of RCW 75.12.010. The proviso states:

> *And provided,* That whenever the director determines that a stock or run of salmon cannot be feasibly and properly harvested in the usual manner, and that such stock or run of salmon may be in danger of being wasted and surplus to natural or artificial spawning requirements, the director may maneuver units of lawful gill net and purse seine gear in any number or equivalents at his discretion, by time and area, to fully utilize such harvestable portions of these salmon runs *for the economic well being of the citizens of this state,* . . .

(Italics ours.)

By this proviso the department is given an affirmative duty to determine whether there are salmon available that are surplus to natural or artificial spawning requirements and, if so, to authorize the harvesting of this surplus, so as to fully utilize the harvestable portions for the economic well-being of the citizens as a whole.

[1] Reading those statutes together, it will be seen that the department has the statutory duty to authorize the harvesting of salmon not required for natural or artificial spawning. It is clear, therefore, that the department may restrict the harvesting of salmon by the commercial fishermen only to the extent that no surplus exists and that the restriction is necessary to prevent the impairment of the supply of salmon.

Supporting the conclusion that the department is authorized to act for conservation purposes only is the fact that there is no other statute regulating commercial fishing which contains any substantive directive to the Department of Fisheries.

An additional expression of legislative intent that the department's activities should be designed to conserve fish is found in the final paragraph of RCW 75.08.012.

> For the purpose of conservation, and in a manner consistent therewith, the department shall seek to maintain the economic well-being and stability of the commercial fishing industry in the state of Washington.

It has been suggested that RCW 75.08.080 provides authority for the department to act for purposes other than conservation. This section provides, insofar as pertinent:

> The director shall investigate the habits, supply and economic use of, and classify, the food fish and shellfish in the waters of the state and the offshore waters, and from time to time, make, adopt, amend, and promulgate rules and regulations as follows:

There follows a series of paragraphs requiring the director to regulate fishing areas, gear, disposal of fish, landing of fish, destruction of predators, and the prevention and suppression of disease; also to specify types of fish which may be taken and reports which must be made; and the kinds of uses which may be made of particular fish.

RCW 75.08.080 delineates the methods by which the department shall comply with the guidelines set forth in RCW 75.08.012. Nowhere does the section authorize the director to allocate fish among competing claimants for purposes other than conservation. It is obvious that all of the regulations required or authorized are directed to the purpose of conservation.

It is evident that the department's construction of the statutes is the same as ours. There has been introduced at its instance in the last two sessions of the state legislature, legislation which would grant the department this authority to allocate fish among Indians and non-Indians. The most recent bill introduced was House Bill No. 1334, which died in committee in the 1976 session.

As recently as December 11, 1976, the Tacoma News Tribune reported that the Director of Fisheries said he would ask the legislature for the right to allocate fish and the power to set different fishing seasons for non-Indians and treaty Indians. A reasonable inference would appear to be that the department recognizes that it does not have the statutory authority to allocate fish to treaty Indians or to non-Indians.

[2] But were we to assume that the Department of Fisheries has the authority to adopt regulations designed for the purpose of allocating fish among competing claimants, we would be confronted by constitutional provisions which stand in the way of its doing so in a manner which discriminates among fishermen of the same class.

Since Indians are citizens of the United States and of this state—and not citizens of a foreign power—they are subject to the constitutions of these governments. The restrictions which these documents place upon governmental action apply to actions taken with regard to these citizens. Thus, they can neither be denied equal protection of the laws nor granted special privileges and immunities. Classification which distinguishes between commercial and noncommercial fishermen has a reasonable basis in fact, which is related to the legitimate governmental purposes of conservation and promotion of the economic welfare of the state. Distinctions between fishermen based upon their race or ethnic background are not proper. Treaties protecting Indian rights in the state's natural resources should be read so as to harmonize their provisions with constitutional mandates if this can reasonably be done. We think the construction which this court placed upon the words "in common with" in the case of *Department of Game v. Puyallup Tribe, Inc.*, 86 Wn.2d 664, 548 P.2d 1058 (1976), achieves this purpose, and accords with the intent expressed in the treaties.

There remains the question whether federal courts can order state agencies to act beyond their authority as defined by state law.

[3] The United States Supreme Court has stated that a federal court will not compel governmental officers to do any act which they are not authorized to do by laws of the state from which they derive their power. *Supervisors v. United States*, 85 U.S. (18 Wall.) 71, 21 L. Ed. 771 (1873); *United States v. County of Clark*, 95 U.S. 769, 24 L. Ed. 545 (1878); *Missouri ex rel. Laclede Gas Light Co. v. Murphy*, 170 U.S. 78, 42 L. Ed. 955, 18 S. Ct. 505 (1898).

In *Murphy* the court stated at page 95:

> Mandamus lies to compel a party to do that which it is his duty to do, but can confer no new authority, and the party to be coerced must have the power to perform the act.

And following on page 99, the court stated:

> The street commissioner had no power under the charter and ordinances to issue the permit requested in the absence of the assent of the board of public improvements, which had general control; *and the court could not command him to do that which it was not his official duty to perform.*

(Italics ours.)

In *Brown v. Environmental Protection Agency*, 521 F.2d 827 (9th Cir. 1975), the Court of Appeals in discussing the relationship of federal and state governments quoted at pages 841–42 with approval the following statement from Hart, *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 515–16 (1954):

> Judicial mandates to non-judicial state officers to enforce either primary or remedial duties requiring the performance of affirmative acts are relatively infrequent. Lower federal courts may *prohibit* state officers, in their individual capacity, from taking action under color of office in violation of law. But an action to compel the performance of an affirmative act would encounter, ordinarily, the bar of the Eleventh Amendment. Whether a writ of mandamus to compel performance of a ministerial duty would be regarded as an action against the state is not altogether clear. But it is significant that a practice of issuing such writs to state officers has never become established.

The court further pointed out at page 841:

> The Constitution counts upon the necessary participation of the states in the electoral process not by direct command but by the incentive of not losing the opportunity of participation. In similar fashion Congress now elicits desired affirmative performances from the states by attaching them as conditions to the receipt of federal grants-in-aid. If we search the Constitution for provisions which have the appearance of

affirmative requirements, two of the most striking are those which call for the surrender of fugitive slaves and fugitives from justice. But the first was disembowelled by the *tour de force* of *Prigg v. Pennsylvania*, [41 U.S. (16 Pet.) 539, 10 L.Ed. 1060], and the second was flatly held, in *Kentucky v. Denison* [65 U.S. (24 How.) 66, 16 L.Ed. 717], to be judicially unenforceable. "And we think it clear," said Chief Justice Taney in the latter case, "that the Federal Government, under the Constitution, has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it." Taney's statement can stand today, if we accept [*sic*] from it certain primary duties of state judges and occasional remedial duties of other state officers. Both exceptions, it will be observed, involve enforcement through the orderly and ameliorating forms of the judicial process. In any event, experience with the exceptions does little to bring into question the principle of the rule.

The respondents argue that a federal district court may require a state agency to take affirmative action regardless of the agency's statutory authority. The case upon which they rely is *Griffin v. County School Bd.*, 377 U.S. 218, 12 L. Ed. 2d 256, 84 S. Ct. 1226 (1964). In that case the district court had issued an injunction requiring the court supervisors to levy taxes in order to provide for desegregated schools. The United States Supreme Court, in an opinion upholding the validity of the order, recognized the power of the official to act in accordance with both state law and the court's order saying that the district court's injunction requiring "[s]upervisors to exercise the power that is theirs to levy taxes" and operate schools on a nondiscriminatory basis was properly issued. *Griffin v. County School Bd., supra* at 233.

The cases cited therein involved actions by state officers or agencies which interfered with federal constitutional rights, and in each case the district court issued injunctions enjoining said officers or agencies from engaging in such interference. None of said cases required the state officers or agencies to take affirmative action.

In other cases cited by the respondents, the state officials or agencies ordered by the federal courts to take action, had the power under state law to comply with the federal court order.

The courts have been consistent in recognizing that a state official cannot be compelled to exceed his authority. The court in *Bradley v. School Bd.*, 51 F.R.D. 139, 142 (E.D. Va. 1970), when requested to order affirmative action by a state official, said:

> To be sure, state officials may only be directed, in fulfillment of this duty, to use those powers granted to them by state law. For this reason the relief which may be demanded of state, as opposed to local, officials is restricted . . . In each case, however, the obligation is commensurate with the scope of the power conferred by state law.

In *Wright v. County School Bd.*, 309 F. Supp. 671 (E.D. Va. 1970), the court discussed the scope of a district court's power to effectuate desegregation of a district's schools. At page 677 it said:

> [A] court will only order a public official to perform or refrain from certain acts which are within the powers conferred upon him by law, Bell v. School Board of Powhatan County, 321 F.2d 494 (4th Cir. 1963), and will deny relief when those parties before it are not fully empowered, under state law, to take the action requested, Thaxton v. Vaughan, 321 F.2d 474 (4th Cir. 1963).

It is the duty of judges to declare and not to make law. *Miller v. California*, 413 U.S. 15, 37 L. Ed. 2d 419, 93 S. Ct. 2607 (1973).

The reason for this restriction is eloquently set forth in the opinion of Justice Harlan in *Oregon v. Mitchell*, 400 U.S. 112, 203, 27 L. Ed. 2d 272, 91 S. Ct. 260 (1970), where he stated:

> [T]he federal judiciary, which by express constitutional provision is appointed for life, and therefore cannot be held responsible by the electorate, has no inherent general authority to establish the norms for the rest of society. It is limited to elaboration and application of the

precepts ordained in the Constitution by the political representatives of the people. When the Court disregards the express intent and understanding of the Framers, it has invaded the realm of the political process to which the amending power was committed, and it has violated the constitutional structure which it is its highest duty to protect.

These principles of federalism were followed most recently in *Rizzo v. Goode*, 423 U.S. 362, 46 L. Ed. 2d 561, 96 S. Ct. 598 (1976), when the Supreme Court reversed a lower federal court's order supervising the handling of citizen complaints within a local police department even though constitutional rights had been violated. The court stated, at pages 379–80:

> The District Court's injunctive order here, significantly revising the internal procedures of the Philadelphia police department, was indisputably a sharp limitation on the department's "latitude in the 'dispatch of its own internal affairs.'"
>
> . . .
>
> Thus the principles of federalism which play such an important part in governing the relationship between federal courts and state governments, though initially expounded and perhaps entitled to their greatest weight in cases where it was sought to enjoin a criminal prosecution in progress, have not been limited either to that situation or indeed to a criminal proceeding itself. We think these principles likewise have applicability where injunctive relief is sought, not against the judicial branch of the state government, but against the judicial branch of the state government, but against those in charge of an executive branch of an agency of state or local governments such as respondents here. Indeed, in the recent case of *Mayor v. Educational Equality League*, 415 U. S. 605 [39 L. Ed. 2d 630, 94 S. Ct. 1323] (1974), in which private individuals sought injunctive relief against the Mayor of Philadelphia, we expressly noted the existence of such considerations, saying: "There are also delicate issues of federal–state relationships underlying this case." *Id.*, at 615.

Contrary to the District Court's flat pronouncement that a federal court's legal power to "supervise the functioning of the police department . . . is firmly established," it is the foregoing cases and principles that must govern consideration of the type of injunctive relief granted here. When it injected itself by injunctive decree into the internal disciplinary affairs of this state agency, the District Court departed from these precepts.

The judicial determination of the extent of a state official's authority to act is solely and exclusively within the jurisdiction of the state courts. *Boal v. Metropolitan Museum of Art*, 19 F.2d 454 (2d Cir. 1927), *cert. denied*, 275 U.S. 565, 72 L. Ed. 429, 48 S. Ct. 122 (1927); 21 C.J.S. *Courts* § 524 n.34 (1940). Thus, as we have already observed, the Department of Fisheries is authorized only to promulgate regulations for conservation purposes. It cannot act to comply with a federal court order which imposes upon it a duty outside its statutory authority.

[4] With respect to the weight to be given to the decision in *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), it must be remembered that, long before that case came before the federal trial court, the Washington court system had been called upon to interpret the same treaties. On August 15, 1965, the Superior Court for Pierce County passed upon the rights of Indians claiming under the Medicine Creek treaty, both as to steelhead fish and salmon. This court in *Department of Game v. Puyallup Tribe, Inc.*, 70 Wn.2d 245, 422 P.2d 754 (1967), and *Department of Game v. Kautz*, 70 Wn.2d 275, 422 P.2d 771 (1967), began a series of opinions which were to be considered by the United States Supreme Court on two occasions, by the Superior Court on three occasions, and by the Washington State Supreme Court on two additional occasions. (*See Puyallup Tribe v. Department of Game*, 391 U.S. 392, 20 L. Ed. 2d 689, 88 S. Ct. 1725 (1967); *Department of Game v. Puyallup Tribe*, 414 U.S. 44, 38 L. Ed. 2d 254, 94 S. Ct. 330 (1973); *Department of Game v. Puyallup Tribe, Inc.*, 86 Wn.2d 664, 548 P.2d 1058 (1976).)

In *Department of Game v. Puyallup Tribe, Inc., supra* at 678–79 (1976), we carefully examined both the treaties and the United States Supreme Court decisions that have been rendered concerning the Medicine Creek treaty and other Indian treaties specifically and treaty rights generally. It was said:

> We conclude therefore that a proper interpretation of the Treaty of Medicine Creek permits the State to promulgate conservation regulations meeting appropriate standards that affect all citizens, Indian and non–Indian, equally. However, such regulations cannot deny the Indians access to their usual and accustomed fishing places, nor can they restrain Indian fishing at those places except to the extent the regulations restrain the fishing rights of all state citizens, *e.g.*, regulations as to time and manner of fishing, size of catch, etc.

This interpretation finds support in the decisions rendered by the United States Supreme Court in 1967 and 1973. In *Puyallup Tribe v. Department of Game, supra* (1967), the United States Supreme Court stated, at page 398:

> [W]e see no reason why the right of the Indians may not also be regulated by an appropriate exercise of the police power of the State. The right to fish "at all usual and accustomed" places may, of course, not be qualified by the State, even though all Indians born in the United States are now citizens of the United States. . . . But the manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated by the State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians.

Accord, Department of Game v. Puyallup Tribe, supra (1973).

This court, in *Department of Game v. Puyallup Tribe, Inc., supra* at 682 (1976), stated:

> [I]t is also inconceivable that either the tribe or the government intended the treaty to create any rights beyond the natural run . . . This plain language demonstrates that the rights secured to the tribe under the treaty did not encompass artificially propagated sources of fish. Likewise, the Supreme Court indicated in *Puyallup II*

> [*Department of Game v. Puyallup Tribe*, 414 U.S. 44, 38 L. Ed. 2d 254, 94 S. Ct. 330 (1973)] that this result is correct. The majority opinion made no comment at all on the issue, but the concurring opinion of Mr. Justice White stated that "the Treaty does not obligate the State of Washington to subsidize the Indian fishery with planted fish paid for by sports fishermen." *Puyallup II* at 49.

Thus prior to the decision of *United States v. Washington, supra*, there had been a long development of case law, exhibiting an approach by the United States Supreme Court, which, while it was more liberal in its interpretation than was this court, always recognized legitimate state interest in the conservation of its natural resources and never purported to find in the treaties a provision giving the Indians a right to allocations.

We are asked to accede to the federal district court's interpretation of the Medicine Creek and other Indian treaties, whereby it found that treaty Indians have the right to 50 percent of the salmon runs, plus fish for ceremonial and subsistence purposes. It appears that, if this ruling is given effect, non–Indian fishermen will be required to refrain from fishing until the Indians have harvested 50 percent of the fish runs, plus an undetermined additional number of fish.

Being cited no authority for the proposition that federal district courts have exclusive jurisdiction to construe Indian treaties—treaties which affect important interests of the state—we adhere to our own interpretation of the treaty. This interpretation, we believe, results in fairness and justice to all fishermen. It is consistent with the common understanding and practice since the treaties were signed and up until the decision of the federal district judge in *United States v. Washington, supra*. Under our interpretation, treaty Indians have always been afforded the same opportunities as non–Indians to fish commercially by trolling, purse seining, gill netting, or reef netting, and to fish for recreational and other purposes. In addition, they have

been exempt from the payment of license fees which a nontreaty Indian must pay. *See Tulee v. Washington*, 315 U.S. 681, 86 L. Ed. 1115, 62 S. Ct. 862 (1942). And further, state regulations have been subject to the requirement that there be reasonableness applied to treaty Indians. *See State v. McCoy*, 63 Wn.2d 421, 387 P.2d 942 (1963).

We cannot ignore the facts that the holding of the district court has severe economic effect on many nontreaty fishermen; that it will result in the enrichment of some individual treaty Indian fishermen, but will not necessarily result in economic benefit to the tribal units; that it has caused discontent among nontreaty Indians; that it has caused hostility between the treaty and other fishermen, and has jeopardized the good relations heretofore existing among these parties; and that it has resulted in violence and violations of the law. But beyond all of this, it has threatened the survival of the fish runs. Already, the steelhead runs in many of the rivers have been seriously damaged. For example, the Skagit River, which had been the largest steelhead producer in the state, has been depleted to the point that it ranks seventh, and the nontreaty fishing season has been cut from 5 months to 3 months.

All of these facts attest to the soundness of our interpretation of the treaty provisions. They dictate that we should adhere to that interpretation. Our adherence to the decision in *Department of Game v. Puyallup Tribe, Inc.*, 86 Wn.2d 664, 548 P.2d 1058 (1976), makes it unnecessary to consider the petitioners' further contention that treaty Indians are not entitled to a specified percentage of hatchery fish.

We hold that the Director of Fisheries has the authority to pass regulations only for conservation purposes. We hold that he cannot allocate fish to any user of the same class, that every fisherman in a class must be treated equally, and

that each should be given an equal opportunity to fish within lawful statutes and regulations.

WRIGHT, C.J., HAMILTON, and BRACHTENBACH, JJ., and ARMSTRONG, J. Pro Tem., concur.

HOROWITZ, J. (concurring in part; dissenting in part)—The petitions for writ of mandamus in the instant case seek an order compelling the Department of Fisheries of the State of Washington and its director to take action which is violative of the injunction entered in *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975). Certiorari was denied by the Supreme Court of the United States, 423 U.S. 1086, ___ L. Ed. 2d ___, 96 S. Ct. 877 (1976).

The petitioners, *inter alia*, rely heavily on *Department of Game v. Puyallup Tribe, Inc.*, 86 Wn.2d 664, 548 P.2d 1058 (1976), for its interpretation of the treaty Indian fishing rights under the Treaty of Medicine Creek, 10 Stat. 1132 (1854). The petitioners recognize that "conflict already exists between this Court's opinion in *Puyallup Three*, 86 Wn.2d 664 and *U.S. v. Washington*, on both the issues of hatchery fish and equal opportunity vs. equal fish." Reply Brief of Petitioners at 14.

Petitioners concede that "[w]hether or not the decision of the federal court [*United States v. Washington, supra*] was correct is no longer an issue." Memorandum in Support of Petitioners' Application for a Writ of Mandamus at 7.

Petitioners contend, however, "[t]he only issue now which must be passed upon is how is that judgment properly enforced and who is to bear the brunt and expense of enforcement of it." Memorandum in Support of Petitioners' Application for a Writ of Mandamus at 7. The difficulty with petitioners' quoted contention is that *United States v. Washington, supra* at 389–93, 399–412, 413–20, and particularly at page 416, held that the Department of Fisheries and its director had the authority and were indeed obligated under the supremacy clause to refrain from violating

the District Court injunction. Indeed, the defendants, including the Department of Fisheries and its director, are specifically ordered to "fully observe and to the best of their ability carry out the provisions and purposes of the treaties cited in paragraph 1 of the Findings of Fact," and "conform their regulatory action and enforcement to each and all of the standards set forth in Final Decision #1." *United States v. Washington, supra* at 414. This provision is now final in the federal court system and the Department of Fisheries and its director are bound by the injunction. Moreover, as *United States v. Washington, supra* at 402 states: "Because the right of each treaty tribe to take anadromous fish arises from a treaty with the United States, that right is reserved and protected under the supreme law of the land, does not depend on state law, is distinct from rights or privileges held by others, and may not be qualified by any actions of the state."

Since the filing of the petition for the writ of mandamus, the Supreme Court of the United States has granted a writ of certiorari to review the decision in *Department of Game v. Puyallup Tribe, Inc., supra,* on which petitioners rely to define the treaty Indian fishing rights under the Treaty of Medicine Creek, *supra,* and this court has granted a rehearing in *Washington State Commercial Passenger Fishing Vessel Ass'n v. Tollefson,* 87 Wn.2d 417, 553 P.2d 113 (1976), dealing with the powers and duties of the Department of Fisheries and its director in the management of the salmon fisheries of this state. That rehearing will be held in the May 1977 term.

The issues involved in the petition for certiorari which has been granted by the Supreme Court of the United States, have been the subject of briefs by various parties, including an amicus curiae brief filed on behalf of the United States at the invitation of the Supreme Court of the United States to enable the United States to express its views on the issues raised in the petition for certiorari. Whether, or to what extent, the forthcoming decision of the Supreme Court of the United States in the matter on which

it granted certiorari and the forthcoming decision of this court on the rehearing of *Washington State Commercial Passenger Fishing Vessel Ass'n v. Tollefson, supra,* will affect the outcome of the petition before this court, or a like petition should one be filed, remains to be seen.

Meanwhile, however, we must determine the effect we must give to the injunction issued in *United States v. Washington, supra,* which has now become final in the federal system.

There is no claim the injunction issued in *United States v. Washington, supra,* is void because of lack of jurisdiction of the parties and subject matter; nor is there any claim the Department of Fisheries or its director are not bound by that decision as parties to *United States v. Washington, supra.* The claim at most is that the United States District Court erred in ordering the Department of Fisheries and its director to comply with its decision and injunction, petitioners contending such compliance is beyond the authority of the Department of Fisheries and its director. As already pointed out, the United States District Court rejected this contention and the injunction is binding upon the Department of Fisheries and its director.

Accordingly, whether or not this court agrees with the decision in *United States v. Washington, supra,* is no longer the question. As already pointed out, petitioners admit the correctness of this decision "is no longer an issue." It follows that if the Department of Fisheries and its director refuse to obey the federal court injunction, they will be in contempt of the United States District Court and will be subject to sanctions for disobedience. 18 U.S.C. § 401 (1948). This court is powerless to prevent the imposition of those sanctions should the Department of Fisheries or the director violate the federal court injunction, whether or not pursuant to the order of this court.

Under the circumstances presented, if this court is to adhere to the rule that the office of a writ of mandate is to enforce a duty owing, rather than to direct its violation and if due regard is had to protect the integrity of the federal

and state constitutional structure of which this court is a part, then this court must deny the writ and I concur for the reasons stated. *See People ex rel. Ammann v. Dipper*, 392 Ill. 38, 44, 63 N.E.2d 870 (1945); *State ex rel. First Nat'l Bank v. Botkins*, 141 Ohio St. 437, 48 N.E.2d 865, 148 A.L.R. 205 (1943); *cf. State ex rel. Missouri Pac. Ry. v. Williams*, 221 Mo. 227, 255–57, 120 S.W. 740 (1909); *Thomason v. Cooper*, 254 F.2d 808, 810–11 (8th Cir. 1958).

A denial of the petition for writ of mandamus will suffice to dispose of this case. The majority opinion, however, after denying the writ, proceeds to determine the legal authority of the Department of Fisheries of the State of Washington and the Director of Fisheries to observe the Medicine Creek Treaty Indian fishing rights as construed in *United States v. Washington, supra*. They do so because, as its states: "We have full confidence that the director will abide by our decision." The majority opinion ultimately states:

> We hold that the Director of Fisheries has the authority to pass regulations only for conservation purposes. We hold that he cannot allocate fish to any user of the same class, that every fisherman in a class must be treated equally, and that each should be given an equal opportunity to fish within lawful statutes and regulations.

That the interpretation of the Washington statutes is in conflict with *United States v. Washington, supra*, and particularly paragraph 14 of the injunction clearly appears from its text expressly at, *e.g.*, pages 416, 402, and 414.

The effect of the majority's suggestion that the director abide by the majority's decision is to accomplish by indirection what the court has refused to authorize when it refused to grant the writ of mandamus. The injunction in *United States v. Washington, supra*, is expressly made binding upon the "State of Washington; Thor C. Tollefson, Director, Washington State Department of Fisheries; Carl Crouse, Director, Washington Department of Game . . . their agents, officers, employees, successors in interest . . ." *United States v. Washington, supra* at 414.

The same reasons that prevent this court from issuing a writ of mandamus to the Department of Fisheries and its director, and his successors, apply to prevent the court from inviting the Director of Fisheries to accomplish the same result by undertaking to do those things on his own violative of the federal court injunction. I agree with the majority we must deny the writ of mandamus but I dissent from the suggestion of the majority that this court, in effect, invite the Department of Fisheries and its director to take action which would embroil them in contempt proceedings we are powerless to prevent. If the United States District Court, in response to the forthcoming decision of the Supreme Court of the United States in *Department of Game v. Puyallup Tribe, Inc.*, 86 Wn.2d 664, 548 P.2d 1058 (1976), or otherwise, withdraws or modifies its injunction, a different case will be presented.

STAFFORD and UTTER, JJ., concur with HOROWITZ, J.

STAFFORD, J. (concurring with Justice Horowitz)—I concur with the opinion of Justice Horowitz. The Puget Sound Gillnetters Association concession that "[w]hether or not the decision of the federal court [*United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975)] was correct is no longer an issue" would appear to resolve the basic question before us on the writ of mandamus. However, I am compelled to comment further on *Department of Game v. Puyallup Tribe, Inc.*, 86 Wn.2d 664, 548 P.2d 1058 (1976) (*Puyallup III*) for other reasons. As pointed out by the majority and dissenting opinions, *Puyallup* has now been before the United States Supreme Court on three occasions. At no time has the critical portion of the Treaty of Medicine Creek been interpreted so as to fully dispose of the fishing-right conflict caused by the phrase "in common with all citizens of the Territory." 10 Stat. 1133.

As a result, conflicting interpretations have caused the state and federal courts to drift into positions of direct

conflict. Unfortunately, this has become more than an exercise in legal theory, it has developed into a serious social and economic conflict of major proportions. I do not exaggerate when I say that all too frequently lives and property rights have already hung in the balance.

I cannot stress too strongly that in *Puyallup* III, now on review, the United States Supreme Court should refrain from a limited consideration of the issues. Rather, it should interpret the critical section of the treaty. Such an interpretation by the ultimate legal authority is the only way the current legal, economic and social conflict can be resolved. Most assuredly, this unresolved clash between federal and state judicial systems and between economic and social interests cannot be permitted to continue. Too much is at stake in all areas.

HOROWITZ, J., concurs with STAFFORD, J.

APPENDIX E

THE SUPREME COURT OF WASHINGTON

No. 43642

ORDER

GRANTING PETITION FOR REHEARING

WASHINGTON STATE COMMERCIAL PASSENGER FISHING VESSEL ASSOCIATION,

Respondent,

v.

THOR TOLLEFSON, ET AL.,

Appellants.

WASHINGTON KELPERS ASSOCIATION,

Respondent,

v.

THOR TOLLEFSON, ET AL.,

Appellants.

The Court having decided by a vote of five to four that the appellants' petition for rehearing should be granted,

It is ordered that the petition be and it hereby is granted, and that the cause be set for rehearing En Banc at a later date.

Dated this 4th day of November, 1976.

/s/ Charles T. Stafford,
Chief Justice

87 Wn.2d 417

APPENDIX F

WASHINGTON STATE COMMERCIAL PASSENGER FISHING VESSEL ASSOCIATION, *Respondent*, v. THOR TOLLEFSON, ET AL, *Appellants*.
WASHINGTON KELPERS ASSOCIATION, *Respondent*, v. THOR TOLLEFSON, ET AL, *Appellants*.

[1] Appeal and Error—Decisions Reviewable—Moot Questions—Questions of Public Import—Incomplete Development. An appellate court will not consider a moot case on the ground that it presents recurring issues of substantial public interest which require an authoritative determination for the future unless the questions which are necessarily and inherently involved in the case are adequately developed or argued.

[Note: Only 3 Justices concur in the above statement.]

STAFFORD, C.J., and HAMILTON, J., concur in the result only; UTTER, BRACHTENBACH, and HOROWITZ, JJ., and WIEHL, J. Pro Tem., dissent by separate opinion; DOLLIVER, J., did not participate in the disposition of this case.

Appeal from a judgment of the Superior Court for Thurston County, Nos. 50370, 50552, Gerry L. Alexander, J., entered January 23, 1975. *Dismissed.*

Actions challenging the validity of certain state fishing regulations. The defendants appeal from a judgment in favor of the plaintiffs.

Slade Gorton, Attorney General, and *James M. Johnson, Assistant,* for appellants.

Richard W. Pierson (of *Thom, Mussehl, Navoni, Hoff, Pierson & Ryder*), for respondents.

ROSELLINI, J.—This declaratory judgment action was brought to obtain a ruling that certain fishing regulations promulgated by the Department of Fisheries for a period beginning June 15, 1974, were invalid. The Thurston County Superior Court found as a fact that the regulations in question were adopted solely as a result of the decision by Federal District Judge George C. Boldt, Western District of Washington at Tacoma, in *United States v. Wash-*

ington, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, ... U.S. ....., 96 S .Ct. 877, ... L. Ed. 2d ..... (1976), and not "in furtherance of" RCW 75.08 *et seq.*, the statutes defining the powers and duties of the Director and the Department of Fisheries. Upon this finding, the court concluded that the regulations were beyond the authority of the Director.

The court also held the regulations invalid on other grounds.

It is acknowledged that the regulations in question have since been superseded and are no longer of any force or effect. The Director, however, urges the court to consider the question whether the powers conferred in the cited statute include the power to regulate fishing in the waters under its jurisdiction with the object of making a greater number of fish available to the Indians at their usual and customary fishing grounds, in compliance with the order of Judge Boldt in the referenced decision.

[1] Statements of counsel upon oral argument to this court indicated that regulations which have since been promulgated are more acceptable to the Commercial Passenger Fishing Vessel Association (the only respondent participating in the appeal), from which it might be inferred that future litigation between these parties upon this question may not be threatened. But the Director maintains that the question of his authority to allocate fish in response to the federal court decision is a recurring one, of vital importance to his department and to the people of the state of Washington, which needs resolution. He calls our attention to instances in which this court has proceeded, in cases otherwise moot, to consider questions of substantial public interest, upon which an authoritative determination was needed for the future guidance of public officers, and which were of a recurring nature. Examples of such cases are *Hartman v. State Game Comm'n*, 85 Wn.2d 176, 532 P.2d 614 (1975); *Sorenson v. Bellingham* , 80 Wn.2d 547, 496 P.2d 512 (1972); *In re Elliott*, 74 Wn.2d 600, 446 P.2d 347 (1968),

and *National Elec. Contractors Ass'n v. Seattle School Dist. 1*, 66 Wn.2d 14, 400 P.2d 778 (1965).

While each of these elements is to be found here, there are other considerations which make it undesirable that we treat this case as an exception to the general rule that the court will not render advisory opinions. In *In re Elliott*, *supra*, we recognized that one of the important factors deterring the courts from issuing advisory opinions is the risk that the question may not have been adequately developed or argued. Here, vital questions inherent in the case have not been raised, and much less argued. In all the cases where this court has rendered advisory opinions, the question decided has been adequately briefed and vigorously argued. In *State ex rel. Distilled Spirits Inst., Inc. v. Kinnear*, 80 Wn.2d 175, 492 P.2d 1012 (1972), the importance of adequate briefs and arguments was also noted. And in *State ex rel. O'Connell v. Dubuque*, 68 Wn.2d 553, 558, 413 P.2d 972 (1966), we said that before an advisory opinion will be rendered, the proceedings must be "advanced with sufficient militancy to engender a thorough research and analysis of the major issues."

The questions presented here are indeed serious and involve a conflict between the state and federal courts in this jurisdiction. Inherent in the superior court's conclusions was a theory that the federal court could not make an effective order which would place upon an agency of the state a mandatory duty which was not within its statutory powers. The court expressed the belief that the order was not intended to create such a duty. Nevertheless, the order of the federal court by its terms imposes on the state an affirmative duty to make a designated portion of the fish in the waters of the state available to the treaty Indians who were parties to that action.

The parties to this appeal have chosen to treat the case as though the questions that seemed paramount to the trial court were not necessarily involved. The Director argues that the statutory grant of power is broad enough to permit him to manage the fish for purposes other than

conservation,[1] although he does not suggest that his department has any need for such additional powers except to meet the demands of the federal court order.

He also argues that in exercising the power to manage the fish for conservation purposes, he can consider the increased Indian fishing resulting from the federal court decision as a "mortality factor." This argument, however, does not take into account the fact that in making more fish available in the inland waters, as his regulations were designed to do, he was in fact contributing to the same mortality factor. He does not suggest that he would have any reason to increase fish mortality, absent a statutory or court-ordered duty to do so.

The Director does not argue the question whether, assuming his powers do not include the power to allocate fish for purposes other than conservation, he can nevertheless be forced to regulate the taking of fish for such purposes by court order. The respondent assumes that the Director has no such power or duty but offers no authorities in support of the court's theory.

To answer this question, we would be called upon to consider further the question whether a court may order a legislative body to enact a law or regulation (remembering that, in promulgating its regulations, the Department of Fisheries is exercising a delegated power of the legislature and noting that the order is directed to the state itself), and particularly whether a federal court can order a state legislative body to take affirmative action.[2] Also, can a court properly direct an administrative agency's exercise of its discretionary powers?

Other questions which inhere in the resolution of this

[1]*See Hartman v. State Game Comm'n*, 85 Wn.2d 176, 532 P.2d 614 (1975), to the contrary.

[2]A related question is whether the Indian treaties contain any language which indicates an agreement on the part of the United States or its successors in interest to take affirmative action to make fish available at Indian fishing grounds. This is a question not dealt with in the federal court opinion, although the court's order would seem to reflect a finding that the language of the treaties was open to that interpretation.

complex problem arise. For example, was the federal court acting within its proper jurisdiction when it held that the treaty Indians are entitled to a specified percentage of the fish to be found in the waters of this state, or was it, under the guise of interpreting a treaty, actually either modifying or implementing the same?[3] If not, must the courts of this state nevertheless honor the decision and enforce its order, or may they with impunity disregard those portions which they deem to be implementations or alterations?

Another question not considered in the briefs arises from the fact that this court has itself interpreted one of the treaties in question and has arrived at a conclusion as to its meaning which differs from that of the federal court. *Department of Game v. Puyallup Tribe, Inc.*, 86 Wn.2d 664, 548 P.2d 1058 (1976). To which of these interpretations must the state agency respond? The resolution of this question cannot come from this court or from the federal district court, if no definitive authority upon the subject exists. It must come from a higher court whose decisions are binding upon both of us. In short, this dilemma can be resolved only by the Supreme Court of the United States, which, we understand, has been asked to take jurisdiction of the cases involved and settle the question.

Inasmuch as serious and controlling questions necessarily involved in any determination of the Director's powers and duties with respect to the federal court order have been

[3]The general rule appears to be that only the Congress can perform these functions. *See* 87 C.J.S. *Treaties* §§ 9, 15, 25 (1954); in *The Amiable Isabella*, 19 U.S. (6 Wheat.) 1, 71, 5 L. Ed. 191 (1821), where the court was asked to supply an omission in a treaty, Mr. Justice Story said:

> In the first place, this court does not possess any treaty-making power. That power belongs by the constitution to another department of the government; and to alter, amend or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be, on our part, an usurpation of power, and not an exercise of judicial functions.

See S. Crandall, *Treaties, Their Making and Enforcement* (2d ed. 1916); and *see Department of Game v. Puyallup Tribe, Inc.*, 86 Wn.2d 664, 548 P.2d 1058 (1976).

ignored in the briefs, a gratuitous opinion would be inappropriate and ill-advised.

Taking into account the fact there is an imminent possibility that the United States Supreme Court will speak to one or more of these questions, such an opinion would also be premature.

We therefore decline to retain jurisdiction. The appeal will be dismissed.

HUNTER and WRIGHT, JJ., concur.

STAFFORD, C.J., and HAMILTON, J., concur in the result.

UTTER, J. (dissenting)—In legal controversies involving the validity of fishing regulations, the time between action and effect is usually so compressed that the issues are moot before the appellate process can be fully utilized. This was true in the present case. It is therefore of critical importance for this court to resolve issues that are likely to arise again, if we can, consistent with our earlier decisions. The majority recognizes all the elements exist in this case to justify this court resolving the issues presented, even if the case is moot. *See Hartman v. State Game Comm'n*, 85 Wn.2d 176, 532 P.2d 614 (1975). It refuses, however, to consider important issues involved in this appeal, raised by the parties and discussed in the briefs, stating, "vital questions inherent in the case have not been raised, and much less argued." I am completely unable to understand how this can justify our refusal to decide those issues which are fully briefed and properly before us, and which do not require consideration of the additional, peripheral questions raised by the majority. The fishermen of this state and the Department of Fisheries deserve whatever assistance this court can give them by clarifying issues likely to arise in future cases. This is particularly true where the lower court has ruled incorrectly, as I believe it has.

Assuming the Director is bound by the court decrees requiring the State to provide certain fish to Indians, the issue presented is whether he has the authority under the applicable statutes to establish management regulations over other fisheries more completely within the control of

the State. The trial court erroneously concluded certain regulations promulgated by the Director were outside his authority. The court erred by failing to consider the full statutory authority of the Director and did not consider at all his specific authority to promulgate regulations. The trial court looked only to the authority of the Director specified in RCW 75.08.020, which states in part: "The director shall devote his time to the duties of his office and enforce the laws and regulations of the director relating to propagation, protection, conservation, preservation, and management of food fish and shellfish." Additional authority is found in RCW 75.08.080, which provides:

> The director shall investigate the habits, supply and economic use of, and classify, the food fish and shellfish in the waters of the state and the offshore waters, and from time to time, make, adopt, amend, and promulgate rules and regulations as follows:
>
> . . .
>
> (2) Specifying and defining the areas, places, and waters in which the taking and possession of the various classes of food fish and shellfish is lawful or prohibited.
>
> . . .
>
> (6) The fixing of the size, sex, numbers, and amounts of the various classes of food fish and shellfish that may be taken, possessed, sold, or disposed of.

The Director's authority to control the increased Indian fishery is severely restricted both by our decisions and those of the federal courts. *See Department of Game v. Puyallup Tribe*, 414 U.S. 44, 38 L. Ed. 2d 254, 94 S. Ct. 330 (1973); *State v. James*, 72 Wn.2d 746, 435 P.2d 521 (1967). If the Director is unable to manage Indian treaty fishing, which is the subject of federal court decisions, and non-Indian fishing as well, due to the trial court's ruling in this case, the result is a complete lack of proper management leading to over-fishing of the resource. To prevent this he must be able to promulgate regulations in the one area in which he can still exercise control.

The words "conservation" and "management" in the applicable statutes are broad enough to encompass the princi-

ples of allocation embodied in the challenged regulations. Allocation is an important factor in the conservation of fish runs. Where a resource is not presently plentiful enough to satisfy all needs, a restriction on withdrawal must be instituted in order to conserve the renewable resource and insure its availability in the future.

I dissent from the majority's refusal to resolve important issues likely to arise in future litigation. I would reverse the judgment of the trial court and affirm the action of the Director.

BRACHTENBACH and HOROWITZ, JJ., and WIEHL, J. Pro Tem., concur with UTTER, J.

APPENDIX G

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON, THURSTON COUNTY

Nos. 50370 & 50552

JUDGMENT

WASHINGTON STATE COMMERCIAL PASSENGER FISHING VESSEL ASSOCIATION,

Plaintiff,

vs.

THOR TOLLEFSON, Director of Washington State Department of Fisheries; WASHINGTON STATE DEPARTMENT OF FISHERIES; and STATE OF WASHINGTON,

Defendants,

and

WASHINGTON KELPERS ASSOCIATION,

Plaintiff,

vs.

THOR TOLLEFSON, Director of Washington State Department of Fisheries; WASHINGTON STATE DEPARTMENT OF FISHERIES; and STATE OF WASHINGTON,

Defendants.

This matter having come on for trial before the undersigned Judge of the above entitled court, and the court having considered the records and files herein, evidence and testimony submitted at the time of trial, argument of counsel for all parties, briefs submitted on behalf of all parties, and having previously entered its Findings of Fact and Conclusions of Law, and plaintiff, Washington State Commercial Passenger Fishing Vessel Association, being represented by Richard W. Pierson of Thom, Mussehl, Navoni, Hoff & Pierson, and plaintiff, Washington Kelpers Association, being represented by Stephen J. Bean of Bean, Gentry & Rathbone, and the defendants, Thor Tollefson, Director of Washington State Department of Fisheries, Washington State Department of Fisheries, and State of Washington, being represented by Slade Gorton, Attorney General for the State of Washington, and Paul D. Solomon, Assistant Attorney General, now therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. That the court has jurisdiction over the parties and the subject matter of this lawsuit;

2. That the "kelpers" are a group within a class of commercial troll-fishermen who fish predominantly within three miles of the coast who have not been treated equally;

3. That WAC 220-56-013 and -063 and WAC 220-24-020(4) exceed the statutory authority of the Director;

4. That WAC 220-24-020(4) constitutes a denial of equal protection of the laws as to the plaintiff group, Washington Kelpers Association;

5. That the regulations, WAC 220-56-013 and -063 and WAC 220-24-020(4), constitute arbitrary and capricious action by the Director;

6. That the Department is permanently enjoined from the enforcement of regulations WAC 220-24-020(4) and WAC 220-56-013 and -063 for the 1974 season;

7. That said regulations are hereby declared to be invalid; and

8. That plaintiffs, Washington Charter Association and Washington Kelpers Association, recover costs and disbursements.

DATED this 23rd day of January, 1975.

/s/ Gerry L. Alexander
Judge

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON, THURSTON COUNTY

Nos. 50370 & 50552

FINDINGS OF FACT AND CONCLUSIONS OF LAW

WASHINGTON STATE COMMERCIAL PASSENGER FISHING VESSEL ASSOCIATION,

Plaintiff,

vs.

THOR TOLLEFSON, Director of Washington State Department of Fisheries; WASHINGTON STATE DEPARTMENT OF FISHERIES; and STATE OF WASHINGTON,

Defendants,

and

WASHINGTON KELPERS ASSOCIATION,

Plaintiff,

vs.

THOR TOLLEFSON, Director of Washington State Department of Fisheries; WASHINGTON STATE DEPARTMENT OF FISHERIES; and STATE OF WASHINGTON,

Defendants.

FINDINGS OF FACT

1. That the plaintiffs, Washington State Commercial Passenger Fishing Vessel Association and Washington Kelpers Association, are groups of citizens who have associated for the purpose of supporting, enhancing and furthering the interest of charter boat fishing and small boat troll-fishing, respectively.

2. Membership of the Washington State Passenger Fishing Vessel Association (hereinafter called the Washington Charter Association) consists of skippers and owners of charter boats, owners of charter offices in the ports of Ilwaco, Westport and all Olympic Peninsula ports, including but not limited to Neah Bay, Sekiu, La Push, Agate Beach, Port Angeles and others. In addition, associate members of the Washington Charter Association conduct businesses affected by the charter boat industry.

3. Members of the Washington Kelpers Association are small boat, day-trip, troll-fishermen, many of whom either fish to supplement their normal earned income, supplement their retirement income, or to provide funds with which to educate themselves. Members of the association do a predominate amount of their fishing within three miles of the shoreline of the State of Washington and along the coastal waters of the State of Washington.

4. The Washington State Department of Fisheries, hereinafter referred to as the Department, and Thor Tollefson, Director of the Department, hereinafter referred to as the Director, exist pursuant to the laws of the State of Washington, to-wit: R.C.W. 75.08.020, which states in part as follows:

> "The Director shall devote his time to the duties of his office and enforce the laws and regulations of the Director relating to propagation, protection, conservation, preservation, and management of food fish and shell fish. * * *"

and in R.C.W. 75.08 *et seq.*

5. On February 12, 1974 Federal District Judge George C. Boldt, Judge of the Western District of Washington at Tacoma, rendered a decision cited at *United States of America, et al, Plaintiffs, vs. State of Washington, et al, Defendants*, Civil No. 9213 (hereinafter referred to as the Boldt decision); wherein Judge Boldt held (pursuant to the Treaty of Medicine Creek and other treaties) that the State of Washington must insure treaty Indian fishermen:

(a) All the fish necessary for their reservation fishery,

(b) Their personal use fishery,

(c) Their ceremonial use fishery,

(d) Fifty percent of the remaining fish which are harvested at their usual and accustomed areas if not otherwise harvested in state waters, and

(e) An "equitable adjustment" to compensate the Indians for fish originating in their usual and accustomed area but harvested in areas outside the state's jurisdiction (i.e., in the ocean and in state waters under International Pacific Salmon Commission regulations).

6. On March 22, 1974 Judge Boldt entered an order providing for an interim plan, paragraph 5 of which provides:

> "The defendants will make significant reductions in the non-Indian fisheries, all are necessary to achieve the ultimate objectives of the court's decision without requiring mathematical precision, but in making such reductions will do so consistent with the concept of permitting the full harvest of fish."

7. (a) On April 24, 1974 the Department, as a direct result of the Boldt decision, passed regulations directly affecting both plaintiffs, solely as a result of the Boldt decision and not in furtherance of the statutory enabling legislation cited in paragraph 4 above, which regulations would not have been enacted but for the Boldt decision.

(b) The regulations WAC 220-56-013 and -063 and WAC 220-24-020(4) were adopted after a consideration of alternatives and after a full public hearing in accordance with the procedural provisions of the Washington State Administrative Procedures Act.

8. WAC 220-56-013 and -063, affected plaintiff Washington Charter Association, in that said regulations reduced the sport catch limit along Washington coastal waters from three to two fish per sport angler per day.

9. WAC 220-24-020(4) applies to all commercial trollers, but affects the plaintiff Washington Kelpers Association in that (4), in its entirety, states as follows:

> "It shall be unlawful to take, fish for or possess salmon taken with troll-line gear for commercial purposes from within waters under Washington State jurisdiction."

10. The Department regulates Washington commercial trollers beyond three miles of the shore and coast in that it directly assumed jurisdiction over the Washington commercial trollers who are fishing beyond three miles with a prohibited type of gear and indirectly regulates beyond three miles in that the Department proscribes regulations affecting the landing of fish caught beyond three miles when they are landed within three miles in Washington.

11. Most commercially caught salmon caught within Washington's waters are caught by trip-trollers fishing in large boats rather than by the small-boat, light-tackle commercial fisherman known as a "kelper" who does most of his fishing within three miles of shore on a day-trip basis.

12. The Department did not enact, in an attempt to comply with the Judge Boldt decision, any regulation which would have affected the so-called trip-troller.

13. One of the reasons the Director elected not to regulate the commercial fishery beyond the three-mile limit was because he believed such action would have an adverse economic impact on the State of Washington.

14. The plaintiff, Washington Charter Association, was directly and adversely affected by WAC 220-56-013 and -063 and the plaintiff, Washington Kelpers Association, was directly and adversely affected by WAC 220-24-020(4).

15. During the time period that each of these regulations was in effect, prior to temporary injunctions being issued, each plaintiff suffered an economic impact as a result of the particular regulation in question affecting it and had the regulation or regulations remained in effect, without judicial intervention, each plaintiff association and its members would continue to have been adversely economically affected by the regulations in question.

16. Irreparable harm would result to each plaintiff if the regulations were held to be valid.

17. The Washington Charter Association was irreparably damaged during the time the Department had in effect the regulation which decreased the daily sport bag limit from three to two fish in Washington coastal waters from June 15 to June 17, 1974, in that, the charter boat fleet in both Ilwaco and Westport experienced a sharp decrease in numbers of sports fishermen carried aboard the charter boat vessels which necessitated a three to six week recovery period.

18. Many small-boat commercial fishermen, members of the Washington Kelpers Association, who fish predominantly within three miles of shore would be unable to continue in business were WAC 220-24-020(4) declared valid.

19. The small-boat, light-tackle commercial fisherman, commonly known as a "kelper" fishes predominantly within three miles of the Washington coast and shoreline.

20. The "kelpers" are a group within a class of fishermen, separate and apart from the deep-sea or trip-troller type of fisherman and there is a factual difference in the methodology as well as the location of fishing between this special class of fisherman known as a "kelper" from other types of commercial fishermen.

21. The charter boat fleet in Washington coastal waters is regulated by the regulations promulgated by the defendant Department of Fisheries, the subject of this lawsuit, both within and beyond the three mile limit. The sport bag limit applies whether salmon are caught by sport fishermen within or beyond the three mile limit along the Washington coast.

From the foregoing Findings of Fact the court now makes the following

CONCLUSIONS OF LAW

1. The court has jurisdiction over the parties and the subject matter of this lawsuit.

2. The "kelpers" are a group within a class of commercial troll-fishermen who fish predominantly within three miles of the coast who have not been treated equally.

3. WAC 220-56-013 and -063 and WAC 220-24-020(4) exceed the statutory authority of the Director.

4. WAC 220-24-020(4) constitutes a denial of equal protection of the laws as to the plaintiff group, Washington Kelpers Association.

5. The regulations, WAC 220-24-020(4) and WAC 220-56-013 and -063, constitute arbitrary and capricious action by the Director and the Department of Fisheries.

6. The Department is permanently enjoined from the enforcement of regulations WAC 220-24-020(4) and WAC 220-56-013 and -063, for the 1974 season.

7. Said regulations are hereby declared to be invalid.

8. The plaintiffs, Washington Charter Association and Washington Kelpers Association, recover costs and disbursements.

DATED this 23rd day of January, 1975.

/s/ Gerry L. Alexander
Judge

APPENDIX H

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

No. 9213

PRELIMINARY INJUNCTION STAYING STATE COURT
INJUNCTION AND ORDER IMPLEMENTING
PRELIMINARY INJUNCTION

UNITED STATES OF AMERICA, et al.,

Plaintiffs,

v.

STATE OF WASHINGTON, et al.,

Defendants.

This matter having come on regularly before the Court on Plaintiffs' motion for a preliminary injunction staying state court injunction and for an order implementing the preliminary injunction, and the Court having considered the memoranda, oral argument of counsel and the record in this case, the Court makes the following Findings of Fact and Conclusions of Law and on the basis thereof, issues the following Orders:

FINDINGS OF FACT

1. In an effort to assure plaintiff tribes their federally guaranteed treaty fishing rights and at the same time avoid unnecessary conflict with the State judiciary, the United States, and the plaintiff tribes on July 28, 1977 asked this Court to specifically determine and allocate a portion of the harvestable fish between treaty and non-treaty fishermen for the 1977-78 season.

2. This request was prompted by the Washington Supreme Court's determination that the Department of Fisheries had no authority to make such an allocation under State law and the decisions of that Court that the Director must affirmatively authorize the harvest of all fish not needed for propagation escapement and must do so on a basis that does not recognize treaty fishermen as a separate class whose distinct Federally secured rights are to be specifically protected. This Court thereupon issued a preliminary order on August 10, 1977 by which it assumed the responsibility for allocating the salmon runs between treaty and non-treaty fishermen, enjoined the State from

authorizing or permitting harvest of the treaty fishermen's share, and directed the State to manage the remaining portion in a manner that would meet conservation needs and permit harvest of the remainder by non-treaty fishermen under State law and control. This Federal Court ordered allocation was necessary *only* because the State Supreme Court's interpretation of State law had prohibited State regulatory or management authorities from safeguarding or observing the treaty tribes' Federal rights. *Puget Sound Gillnetters Association* v. *Moos*, 88 Wash. 2d 677 (1977). *Purse Seine Vessel Owners Association* v. *Moos*, 88 Wash. 2d ——— (1977).

3. The August 10, 1977 order referred to above allocated a specific number of Puget Sound Chinook to treaty Indians for the 1977-78 season. This Court removed from the State of Washington authority, control and jurisdiction over the treaty allocation. The State was enjoined from exercising any form of harvest management authorization over the fish so allocated.

4. The defendant Director of Fisheries promulgated regulations consistent with this Court's Orders but was then enjoined by the Superior Court for Thurston County from enforcing Emergency Orders 77-68, 77-70 and 77-73. *Puget Sound Gillnetters Association* v. *Sandison*, No. 58107. The Director had determined that his regulations were necessary to effectuate the management scheme ordered by this Court. The Director of Fisheries was also ordered by the State Court to adopt harvest regulations based upon the total predicted number of salmon in the Puget Sound Area in such a manner as to eliminate the opportunity for treaty fishermen to harvest their treaty share and in total disregard of this Court's prior orders including Final Decision No. 1.

5. The very purpose of this Court's allocation order was to provide the treaty Indian fishermen the fishing opportunity required under treaties with the plaintiff tribes as interpreted by prior decisions of this Court.

6. The number of fish needed to insure proper spawning escapement remains within the jurisdiction of the State of Washington. Regulations adopted by the state (77-68, 77-70, 77-73) were necessary to insure that non-treaty fishing did not encroach upon fish needed to perpetuate the run.

7. The regulations enjoined by the state court were adopted by the Director of Fisheries to comply with this Court's allocation order. The Thurston County Superior Court's injunction against enforcement of these regulations therefore brings that court into direct conflict with specific orders of this Court. In addition to the order of August 10, 1977, the state court's action is in direct conflict with this Court's decsion of March 12, 1974 (384 F. Supp.

312) which has been affirmed by the United States Court of Appeals for the Ninth Circuit and is now final and binding (520 F.2d 676, 693, *cert. denied* 423 U.S. 1086). That decision orders, in part, that:

> The defendants will make significant reductions in the non-Indian fishery, as are necessary to achieve the ultimate objectives of the Court's decision without requiring mathematical precision, but in making such reductions will do so consistent with the concept of permitting the full harvest of fish. 384 F. Supp. at 420.

8. If the state court's judgment is permitted to stand, the orders of this Court will be rendered ineffective and plaintiff tribes will again be denied their federally determined rights. Therefore, it now appears that in order to protect and effectuate the prior orders of this Court, and to preserve its jurisdiction over the subject matter, it is necessary that this Court stay the state court's preliminary injunction and enjoin the state courts' from proceeding further in contravention of this Court's orders.

CONCLUSIONS OF LAW

1. Based upon the legal arguments presented, this Court is satisfied that it has jurisdiction to enjoin the state court proceeding referred to, within the express exceptions to the anti-injunction statute, 28 U.S.C., Section 2283 and under the authority of *Leiter Minerals, Inc.* v. *United States*, 352 U.S. 220 (1957). The Court believes it has an urgent duty to take such action to the extent shown necessary in order to effectuate its judgment and protect the Federal treaty rights declared therein.

2. It is clear beyond reasonable question that the state court injunction referred to above, if allowed to remain in effect, would prevent defendants from complying with this Court's order to manage the non-treaty allocation share in such manner as to protect fish needed for escapement and not interfere with the treaty fishermen's opportunity to catch their allocated share of the harvestable resource. Interference with the exercise of Indian treaty fishing rights indisputably is within the jurisdiction of this federal Court, and state court proceedings instituted by non-parties to this lawsuit cannot be allowed to frustrate either the jurisdiction or the final determinations of this Court.

3. Based upon the above findings, the data, memoranda and arguments recently received and reviewed in connection with this Court's Order dated August 10, 1977, the Temporary Restraining Order dated August 26, 1977 and this motion, the Court concludes

that gross inequities between treaty and non-treaty harvest will occur if defendants are prevented from enforcing their adopted regulations. Because substantial fish resources will be lost for this year to plaintiff tribes if not harvested during the current and upcoming seasons, the immediate threat of substantial economic harm and serious hardship to many treaty right fishermen convinces this Court that prompt action is required to protect Federal treaty rights that this Court has found are constitutionally guaranteed as the law of the land and to assure the viability of this Court's orders. Plaintiffs herein have overwhelmingly met their burden of proof to show that enforcement of the proposed Department of Fisheries regulations limiting the fishing time on the non-treaty allocation would achieve at least partial compliance with this Court's directives to make additional fish available for harvest by treaty right fishermen, and that prohibition by the state court of enforcement of that regulation presents an immediate threat of substantial economic harm and serious hardship to plaintiff tribes. Thus, while plaintiffs have demonstrated irreparable injury to the treaty fishermen if the injunction is not granted, defendants have not demonstrated a substantial injury which will result to either themselves or other interested persons as a result of issuance of the preliminary injunction.

4. The Court further concludes that the public interest will best be served here by permitting the United States government to honor its treaty obligations to the Indians and by this Court seeing that its valid, final judgments and orders are protected and effectuated.

5. For the reasons set forth above, the Court finds and concludes that the plaintiffs have a strong likelihood of prevailing in this cause following a trial on the merits and thus the preliminary injunction staying the state court preliminary injunction should issue.

6. Alternatively, the Court finds and concludes that not only have plaintiffs raised serious questions, but they have demonstrated that the balance of hardships tips sharply in their favor. *See, William Inglis and Sons Baking Co.* v. *ITT Continental Baking Co.*, 526 F.2d 86 (9th Cir. 1975).

For the reasons hereinabove stated, unless and until this Court orders otherwise, IT IS NOW HEREBY ORDERED AS FOLLOWS:

PRELIMINARY INJUNCTION

1. That the Superior Court of the State of Washington, County of Thurston, is hereby enjoined and prohibited from in any manner or to any extent enforcing the temporary injunction issued by said Court on August 24, 1977, in No. 58107, and from issuing any other order in said cause which in effect will prevent the Department of Fisheries from fully complying with the orders of this Court.

2. That defendants, State of Washington, Gordon Sandison, the Departments of Fisheries and Game of the State of Washington, and their officers, agents, servants, employees and attorneys, and those persons in active concert or participation with any of them, shall not obey, carry out, enforce or otherwise treat as having any lawful force or effect the order of the Thurston County Superior Court for the State of Washington referred to in paragraph (1) above until further order of this court.

Rule 65(c), Federal Rules of Civil Procedure, pertaining to security necessary for issuance of injunctions, provides in part: "No such security shall be required of the United States or of an officer or agency thereof." The application for injunctive relief herein having been made by the United States, this Court may not require security therefore from the United States, and does not require such security from any parties joining in or supporting said application.

IMPLEMENTING ORDERS

For reasons not clear to this Court, the Department of Fisheries takes the anomolous position of opposing entry of this preliminary injunction issued above, while asserting the correctness and appropriateness of the regulations enjoined in the State Court proceeding. This Court's preliminary injunction confirms the propriety of the Department of Fisheries regulations. Moreover, this Court has not and will not direct, limit or in any manner whatever interfere with full exercise of the prerogatives, duties and discretion vested by State law in the Directors of the Departments of Game and Fisheries, except to the extent necessary to enforce the judgment and decree entered pursuant to Final Decision No. 1 and to restore or preserve the Indian treaty rights specified therein. Nothing in this Decision or in the above injunction should be construed or applied to the contrary.

However, due to the circumstances previously recited, and to aid in achieving an equal opportunity to both treaty Indian and non-treaty fishermen to harvest fish in the case area, this Court finds it necessary in aid of its jurisdiction and to protect and effectuate its judgment, to provide as follows:

IT IS HEREBY ORDERED THAT:

1. The defendants are required to enforce their regulations providing for management and control for purposes of conservation and over the non-treaty allocation share so that the treaty allocation shall not be encroached upon.

2. Regulations governing the non-treaty allocation, once adopted by the defendants in accordance with the Court's prior rulings and this order, shall not hereafter be relaxed or rescinded without prior notice to this Court and all parties to this action, unless consent of the affected plaintiff tribes has been obtained prior thereto.

3. To the extent reduction in the non-treaty fishery adopted in accordance with the Court's prior rulings already has been relaxed or rescinded prior to the entry of this order by reason of the preliminary injunction of the Thurston County Superior Court in *Puget Sound Gillnetters Association* v. *Sandison*, No. 58107, issued August 24, 1977, defendants shall cease immediately from carrying out directives, orders or policies in accordance with said preliminary injunction and shall resume forthwith to implement the regulatory schemes and policies previously adopted to effect its management control over the non-treaty allocation share.

4. If, at any time subsequent to the entry of this order, defendants are participants in legal proceedings which, in their judgment might possibly result in an order that could impair or otherwise affect adversely their ability to conform to the requirements of this Court's allocation order, or other orders in this case, defendants shall immediately so inform this Court and shall serve upon all parties to this action copies of all papers filed in such legal proceedings.

5. Defendants shall take such action as may be necessary to notify forthwith their officers, agents, employees, and attorneys, and those persons in active concert or participation with them, of the contents of this order and the duties and obligations defined herein.

IT IS SO ORDERED, ADJUDGED AND DECREED, effective immediately upon entry hereof this 31st day of August, 1977.

/s/ George H. Boldt
Senior United States District
Judge

I hereby certify that on this 7th day of January, 1978, three copies of the Petition for Writ of Certiorari were mailed postage paid, to Mr. John P. World and Mr. Joseph T. Mijich, attorneys for Purse Seine Vessel Owners Association, 2844 Bank of California Center, Seattle, WA, 98154, to Charles E. Yates, attorney for Puget Sound Gillnetters Association, 3300 Sea. First Nat'l Bank Bldg., Seattle, WA 98154, and Mr. Richard W. Pierson, attorney for Washington State Commercial Passenger Fishing Vessel Association and for Washington Kelpers Association, 3737 Bank of California Center, Seattle, WA 98164. I further certify that all parties required to be served have been served.

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